Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term 1993

IN RE:

REINERT & DUREE, P.C.,)
GARY ROBBINS,)
ROBBINS AND ASSOCIATES,)
INC., ESTES & ESTES, INC.,)
AND JAMES C. LANDES,)
)
Petitioners)

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND TO THE RESPONDENT DISTRICT COURT JUDGE

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QUESTIONS PRESENTED

1) Whether Petitioners are entitled to a jury trial on the adversary complaint filed against them for actual damages of One Hundred Five Thousand Dollars ($105,000.00) and for punitive damages, after the Bankruptcy Trustee amended the complaint to delete allegations of violation of the voidable preference rules and to delete allegations of fraudulent conveyance, reducing the complaint to only an allegation of violation of the automatic stay, where it will be necessary for the Bankruptcy Trustee to prove either a voidable preference transfer or a fraudulent conveyance transfer in order to establish that the conveyed property is subject to the Automatic Stay?

LIST OF INTERESTED PARTIES

The following are interested parties in this proceeding:

a) Reinert & Duree, P.C.

b) Gary Robbins

c) Robbins and Associates, Inc.

d) Estes & Estes, Inc.

e) James C. Landes

f) The Respondent, The Honorable Stephen N. Limbaugh, United States District Judge

g) David A. Sosne, Trustee in the Bankruptcy of Just Brakes Corporate Systems, Inc., and Plaintiff in the Adversary Complaint

g) David M. Duree, Attorney for Petitioner

h) Stephen M. Hamburg, Attorney for Trustee and for the Respondent

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IN RE:

REINERT & DUREE, P.C.,	)
GARY ROBBINS,	)
ROBBINS AND ASSOCIATES,	)
ESTES & ESTES, INC.,	)
AND JAMES C. LANDES,	)
	)
Petitioners,	)
	)
vs.	)
	)
THE HONORABLE STEVEN N.	)
LIMBAUGH,	)
	)
Respondent.	)

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND TO THE RESPONDENT DISTRICT COURT JUDGE

Come Now Petitioners, Reinert & Duree, P.C., Gary Robbins, Robbins and Associates, Inc., Estes & Estes, Inc., and James C. Landes, and petition this court for a Writ of Mandamus and/or

Prohibition to order the Respondent to grant Petitioner's demand for a jury trial and Motion to Withdraw Reference from the Bankruptcy Court and/or to prohibit the Respondent from remanding this case to the Bankruptcy Court for a non-jury trial on the following grounds:

This Petition is filed pursuant to 28 U.S.C. §1651(a) and Rule 21 of the Federal Rules of Appellate Procedure.

OPINIONS BELOW

The Order of the Bankruptcy Court transferring the Adversary Complaint to the United States District Court, entered on October 30, 1992, is set forth in Appendix A at page A-55. The Opinion of the Honorable Jean C. Hamilton, United States District Judge, in a related case (Adversary Complaint No. 2) withdrawing that related Adversary Complaint from the

Bankruptcy Court, on the grounds the Defendants therein were entitled to a jury trial, on February 5, 1993, is set forth in Appendix A at pages A-58 through A-60. The opinion of the Respondent, in the case at bar (Adversary Complaint No. 1) denying Petitioner's demand for a jury trial, and remanding the Adversary Complaint to the Bankruptcy Court for non-jury trial, dated August 24, 1993, is set forth in Appendix A at pages A-75 through A-84. The opinion of the United States Court of Appeals for the Eighth Circuit, denying Petitioners' Petition for a Writ of Mandamus and/or Prohibition before that court dated September 27, 1993, is set forth in Appendix D at page D-1.

JURISDICTION

The order of the United States Court of

Appeals for the Eighth Circuit denying Petitioners' Petition for a Writ of Mandamus and/or Prohibition before that court was issued on September 27, 1993. This Court's jurisdiction is evoked under Title 28 U.S.C. §1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States. 11 U.S.C. §362(a) and 362(h). 11 U.S.C. §§547,548,549 and 550.

STATEMENT OF THE CASE

(A) Statement of Facts

1. Petitioners Gary Robbins, Robbins and Associates, Inc., Estes & Estes, Inc. and James C. Landes are Judgment Creditors of Just Brakes Corporate Systems, Inc., having obtained a final judgment for actual and punitive

damages for fraud. Petitioner Reinert & Duree, P.C. is their attorney.

2. On or about January 10, 1991, as Petitioners were attempting to collect their final judgment from Just Brakes Corporate Systems, Inc., the Bankruptcy Debtor, Just Brakes Corporate Systems, Inc. assigned all of its right, title and interest in a trademark to F.G.R. Management, Inc.

3. This trademark was the only asset of any significant value held by the Judgment Debtor, and Bankruptcy Debtor, Just Brakes Corporate Systems, Inc.

4. Through actions filed in the Circuit Court of St. Louis County, Missouri, Petitioners obtained a Court Order scheduling the sale of the trademark, at public sale, pursuant to

the Petitioners' final judgment against Just Brakes Corporate Systems, Inc.; the sale was scheduled for October 15, 1991.

5. Prior to October 15, 1991, on about July 30, 1991, the Sheriff of St. Louis County had also scheduled the sale of the trademark for public sale, pursuant to said final judgment; that sale did not go forward on July 30, 1991 because Just Brakes Corporate Systems, Inc. filed for Chapter 11 Bankruptcy.

6. Thereafter pursuant to Motions filed by Petitioners, the Chapter 11 Bankruptcy of Just Brakes Corporate Systems, Inc. was dismissed by the Bankruptcy Court.

7. Thereafter, the Sheriff of St. Louis County again scheduled the trademark for public sale, pursuant to the final judgment against Just Brakes

Corporate Systems, Inc., scheduling the sale for October 15, 1991.

8. On October 15, 1991, Just Brakes Corporate Systems, Inc. filed its second bankruptcy, a Chapter 7 Bankruptcy; this is the bankruptcy at issue in this case.

9. The second bankruptcy of October 15, 1991 (under Chapter 7) was filed more than nine (9) months after the Bankruptcy Debtor, Just Brakes Corporate Systems, Inc., had assigned all right, title and interest in the trademark to F.G.R. Management, Inc.

10. The Petitioners and the Bankruptcy Trustee for Just Brakes Corporate Systems, Inc. each allege the assignment of the trademark on January 10, 1991 was a fraudulent conveyance in that it was without significant

consideration and was assigned to a corporation which was owned by an individual who was associated with the majority owner of Just Brakes Corporate Systems, Inc.

11. The Sheriff of St. Louis County sold the trademark on October 15, 1991, at public sale, to a corporation from Texas, also known as "Just Brakes", for One Hundred Five Thousand Dollars ($105,000.00).

12. Several days after October 15, 1991 the Sheriff of St. Louis County paid the proceeds of said sale, minus the sheriff's charges and related administrative charges, to Gary Robbins and Reinert & Duree, P.C.

13. On September 18, 1992, David A. Sosne, the Bankruptcy Trustee, filed an Adversary Complaint for actual and

punitive damages against the Petitioners, alleging violation of the automatic stay and also alleging a voidable preferential transfer within 90 days of the bankruptcy, asking for One Hundred Five Thousand Dollars ($105,000.00) in actual damages, plus punitive damages. See Appendix A at pages A-22 through A-34.

14. On October 13, 1992, the Bankruptcy Trustee filed a second Adversary Complaint alleging a fraudulent conveyance with respect to the assignment of the trademark on January 10, 1991 under 11 U.S.C. §548, and in the alternative a voidable preference to an insider, within one year of the filing of the Bankruptcy Petition, under 11 U.S.C. §547. Plaintiff asked for One Hundred Five Thousand Dollars ($105,000.00) in actual damages and "such other and

further relief as the court may deem just and proper". This has been referenced as Complaint No. 2. See Appendix A at pages A-35 through A-45.

15. F.G.R. Management, Inc. was also made a party defendant to Complaint No. 2. David Duree and Reinert, Duree & Crane represent all of the Defendants in both adversary complaints except F.G.R. Management, Inc. which is in default, and unrepresented in Adversary Complaint No.2.

16. Gary Robbins and James Landes are Defendants to both adversary complaints. All other Defendants to the two adversary complaints are Defendants in only one of the two adversary complaints and are not parties to both cases.

17. On or about October 22, 1992

Defendants to both adversary complaints, with the exception of F.G.R. Management, Inc. filed their jury demands, Motions to Withdraw Reference to the Bankruptcy Court and Answers.

18. On October 30, 1992, the Bankruptcy Court transferred both adversary complaints to the United States District Court for the Eastern District of Missouri; Adversary Complaint No. 1 was assigned to the Respondent the Honorable Stephen N. Limbaugh; Adversary Complaint No. 2 was assigned to the Honorable Jean C. Hamilton.

19. On February 5, 1993 Judge Hamilton entered an order granting the request for withdrawal on the grounds that the Defendants in that adversary complaint were entitled to a trial by jury.

20. None of the Defendants in either adversary complaint, with the exception of F.G.R. Management, Inc., filed a claim against the Bankruptcy Estate or otherwise submitted to the jurisdiction of the Bankruptcy Court.

21. F.G.R. Management, Inc. is one of the largest, if not the largest, Creditor of the Bankruptcy Estate of Just Brakes Corporate Systems, Inc.

22. On April 2, 1993, the Bankruptcy Trustee filed his amended adversary complaint in Case No. 1 against the Petitioners, praying for actual damages in the sum of One Hundred Five Thousand Dollars ($105,000.00) plus punitive damages, alleging a violation of the automatic stay. See Appendix A at pages A-61 through A-71.

23. The Bankruptcy Trustee then

moved to remand Adversary Complaint No. 1 to the Bankruptcy Court claiming Petitioners were not entitled to a jury trial because the Bankruptcy Trustee was only claiming a violation of the automatic stay under 11 U.S.C. §362. See Appendix A at pages A-72 through A-74.

(B) Proceedings Below

1. On August 24, 1993 the Respondent denied Petitioners' Motion to Withdraw Reference from the Bankruptcy Court, denied the Bankruptcy Trustee's Motion to Consolidate Adversary Complaint No. 1 with Adversary Complaint No. 2 and granted the Bankruptcy Trustee's Motion to Remand the Case to the Bankruptcy Court, on the grounds that the Petitioners were not entitled to a trial by jury. See Appendix A at pages A-75 through A-84.

2. On about September 1, 1993, Petitioners filed their Petition for a Writ of Mandamus and/or Prohibition with the United States Court of Appeals for the Eighth Circuit.

3. On or about September 8, 1993 the Eighth Circuit Court of Appeals ordered the Respondent to file a response.

4. On or about September 8, 1993 the Respondent filed his response.

5. On or about September 27, 1993 the Eighth Circuit Court of Appeals denied Petitioners' Petition for Writ of Mandamus and/or Prohibition.

REASON FOR GRANTING THE WRIT

The claim of t Bankruptcy Trustee, even in the Amende dversary Complaint, is for actual damages of One Hundred Five Thousand Dollars ($105,000.00) plus

punitive damages.

The Seventh Amendment provides:

> "In Suits at common law, where the value and controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."

In Grandfinanciera S.A. v. Nordberg, 492 U.S.33, 109 S.Ct. 2782, 106 L.Ed.2d 26(1989) at 109 S.Ct. 2782, 2789, this court stated:

> "We have consistently interpreted the phrase 'suits at common law' to refer to 'suites in which legal rights were to be ascertained and determined, in contra distinction to those where equitable rights alone were recognized, and equitable remedies were administered' (citation omitted). Although 'the thrust of the amendment was to preserve the right to jury trial as it existed in 1791,' the

> Seventh Amendment also applies to actions brought to enforce statutory rights which are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." (emphasis original).

The Supreme Court continued at 109 S.Ct. 2793:

> "The nature of the relief respondent seeks strongly supports our preliminary finding that the right he invokes should be denominated legal rather equitable. 'Where an action is simply for the recovery . . . of a money judgment, the action is one at law'
>
> 'Petitioner's contention . . . is that insofar as the complaint requests a money judgment it

presents a claim which is unquestionably legal. We agree with that contention.' (citation omitted). 'Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. The remedy at law is adequate and complete'.

"Indeed in our view Schoenthal v. Irving Trust Co., 287 U.S. 92, 53 S.Ct. 50, 77 L.Ed. 185 (1932), removes all doubt that respondent's cause of action should be characterized as legal rather than equitable. In Schoenthal, the trustee in bankruptcy sued in equity to recover alleged preferential payments, claiming that it had no adequate remedy at law. As in this case, the recipients of the payments

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In The

Supreme Court Of The United States

OCTOBER TERM, 1993

No. 93-

Tina Krail, Lori Chadwick,
Jeannie Henderson and Deborah Smoldore

Petitioners

v.

The State of New Jersey

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

Petitioners, Tina Krail, Lori Chadwick, Jeannie Henderson and Deborah Smoldore, respectfully pray that a Writ of *Certiorari* issue to review the judgment of the Supreme Court of New Jersey entered on October 21, 1993 and the judgment and opinion of the Appellate Division of the Superior Court of New Jersey entered June 30, 1993.

ORDERS AND OPINIONS DELIVERED IN THE CASE

The April 29, 1991 opinion of the Municipal Court of Morristown convicting petitioners under N.J.S.A. 2C:18-3 (trespass) is at A-201. The opinion of the Superior Court of New Jersey, Law Division, affirming the convictions is at A-89-106 [630 A.2d 843 (1991)]. The opinion of the Appellate Division of

the Superior Court, dated June 30, 1993, affirming the convictions solely on Federal Grounds, citing *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992) is at A-82-88 [630 A.2d 792 (1993)]. The Order of the New Jersey Supreme Court entered on October 21, 1993 denying Certification is at A-204.[1]

STATEMENT OF JURISDICTION

Petitioners seek a Writ of Certiorari to review a Final Order of the Supreme Court of New Jersey entered October 21, 1993 and the opinion and order of the Appellate Division of the Superior Court of New Jersey, dated June 30, 1993. The Petitioners have claimed rights under the constitution of the United States, all the issues presented were raised below and the jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(a).

STATEMENT OF CONSTITUTIONAL PROVISIONS

This Petition involves the following constitutional provisions:

1. The Fourteenth Amendment Due Process Clause which states: "Nor shall any state deprive any person of life, liberty or property without due process of law." U.S.Const., amend. XIV, §1;

[1] These petitioners adopt the arguments of petitioner Loce in his separate petition, especially Point II, the rights of the child. This petition addresses issues unique to these petitioners and elaborates on others.

2. The Fourteenth Amendment Equal Protection Clause which states: "Nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1.

STATEMENT OF THE CASE

The petitioners were prosecuted and convicted for attempting to save the life of Mr. Loce's child. This is an abortion case which requires a determination of whether a state has the power to deny any class of individuals natural and inalienable rights, whether women truly have interests inconsistent with their child's interest in life sufficient to support the right of a mother to terminate the life of her own child, and whether New Jersey's actions are violative of the Constitution of the United States.

A. STATEMENT OF FACTS[2]

On September 8, 1990 petitioners Krail, Chadwick, Henderson, and Smoldore, at the express request of Alexander loce, went to an abortion clinic in Morristown, New Jersey to help defend and protect the life of Mr. Loce's child. They chained themselves to Mr. Loce and succeeded in preventing the child's death until the State of New Jersey removed them from the premises. As a result of the State's action the child's life was subsequently terminated.

[2] These petitioners adopt facts set forth in the petition of Mr. Loce.

These petitioners were thereafter prosecuted and convicted of a violation under N.J.S.A. 2C:18-3(b) (trespass). [A-85-86]

B. PROCEDURAL HISTORY

The presence of these petitioners was necessary for Mr. Loce to successfully defend his child's life, and the New Jersey Courts specifically found that their intention in going to the clinic was to defend the life of the child. The State's purpose in removing and prosecuting them was to permit the termination of the child's life and protect the "right" of the mother to terminate the child's life [A-85-88]. On April 29, 1991 Judge Noonan found, as a matter of fact, that the life of a person begins at conception, and that the eight week old "fetus" was a "person", a "human being", and was a "separate and distinct human being from the mother, was a living person, ... unique and individual" [A-98]. Nonetheless, he convicted the petitioners under N.J.S.A. 2C:18-3(b) because he felt bound by this Court's decision in *Roe v. Wade*, supra, which, he stated "legalized the execution of a human being" [A-200].

These petitioners filed timely appeals at every phase of the appellate process, resulting in the Appellate Division of the Superior Court affirming their convictions solely on federal grounds. The Appellate Division reasoned:

> The rights to an abortion guaranteed by the due process clause of the Fourteenth Amendment established by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, (1973)...has only recently been reaffirmed in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. _ 112 S.Ct. 2791 (1992). The purported rights asserted by defendants independently and on behalf of the fetus are unsupported by case law, whereas the mother's rights, which they claim are outweighed, are firmly established. The simple and overriding fact is that each defendant committed a petty disorderly persons offense in an attempt to prevent a *legal and constitutionally protected abortion*. [A-86-87]

From the moment the petitioners were removed from the premises of the clinic until the final order was entered in this case New Jersey was acting to further and protect what it perceived to be the constitutional right of a woman to terminate the life of her child. That this Court has never decided when, in fact, the life of a child begins, and whether a child has rights prior to birth (given the now undisputable fact of the child's existence) requires the Court to grant certiorari. The child's rights have never been directly examined by this Court and the child's personal interest in life has never been weighed. Likewise, a mother's true interests have never been identified and examined in the context of the child's actual existence. These issues are presented by this petition.

REASONS WHY CERTIORARI SHOULD BE GRANTED

In *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. _ 112, S.Ct. 2791 (1992), both the Joint Opinion and the Dissent stated

it was necessary *Roe* be reexamined.[3] *Casey*, however, did not reexamine the questions of when the life of a child begins or whether the child possesses constitutional rights prior to birth.[4] As a result, *Casey* failed to reexamine *Roe* in its most critical aspect. If the life of a human being, a child, begins at conception, this fact has a substantial consequence for the legal issues concerning the child's rights [see Loce Pet. Pt. IA & Pt. II]. But this fact has an important relevance to the real nature of a woman's interests as a pregnant mother. It is critical to the child that the child's interest in actual life be recognized,[5] but it is equally critical that the true nature of the real interests of the women of this nation be identified, recognized and protected.

Until now this court has only attempted to balance a very limited set of perceived "interests" of a woman against a poorly

[3] *Casey*, 112 S.Ct. at 2804; Rehnquist, C.J., dissenting 112 S.Ct. at 2855.

[4] Justice Scalia, dissenting, observed the critical importance of whether the child enjoys actual life. 112 S.Ct. at 2875. Justice Stevens alone addresses the question of the child's rights in Casey. But his statement that the Joint opinion implies that the child is not a "constitutional person" is no more true than the observation that the Joint Opinion implies that a child, after viability, is unequivocally a person in fact. The latter contradicts the former. *Casey* addressed neither. See, *Casey*, 112 S.Ct. at 2807.

[5] These petitioners adopt the legal argument found in the Loce Pet. concerning the rights of the child and its consequences [see Loce Pet Pt. IA & Pt. II]. These pettitioners elaborate on the mother's protectible interests.

defined "interest" of the states without the benefit of determining whether the child is a human being prior to birth. As a result the "interests" of a mother have not been satisfactorily identified, and their nature never completely defined. The problem stems from the Court's conclusion that it could not, in 1973, reach reliable judgment about the fact of the child's existence (and therefore ignored the child's substantive interest in actual life and the mother's real interests). The fact of the child's existence materially alters the true nature of the interests of a woman. Her interests as a pregnant mother must be taken into account, and they conflict with any "interests" before pregnancy which are inconsistent with those of the child. Ignoring this reality has resulted in harm to the mothers subjected to abortion as a "remedy" to satisfy unprotectible "interests" in conflict with her real ones. [See, Pt. II].

I. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES AND A LARGE BODY OF NEW FACTUAL DATA SUPPORT THE CONCLUSION THAT: (1) THE LIFE OF A PERSON BEGINS AT CONCEPTION. AND (2) THE CHILD EXPERIENCES PAIN PRIOR TO BIRTH EVEN IN THE VERY EARLY STAGES OF DEVELOPMENT. THESE FACTS REQUIRE A REEXAMINATION OF THE LEGAL QUESTION OF WHETHER A MOTHER'S PERSONAL INTERESTS ARE COMPATABLE WITH HER CHILD'S INTEREST IN LIFE, AND WHETHER SHE HAS ANY "PROTECTIBLE" INTERESTS WHICH JUSTIFY HER TEMINATING HER CHILD'S LIFE.

A. THE RELEVANCE OF THE FACTS AND NEW TECHNOLOGIES.

1. The Inability of the *Roe* Court to Reach a Conclusion on the Factual Component of the Inquiry Before it Lead to a Wholly Different Legal Analysis than that Required if the Court Found, as a Matter of Fact, that Life Begins at Conception or Prior to Birth.

The whole basis for the *Roe* decision was the premise that in

1973 it was not possible to determine when life began:

> (1) We need not resolve the difficult question of when life begins. ...the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer" 410 U.S. at 159 (emphasis added); and [therefore] (2)...The word 'person', as used in the Fourteenth Amendment, does not include the unborn. 410 U.S. at 158.

Roe is the only case in which the United States Supreme Court reviewed that issue.[6] Significant recent developments and discoveries in science and medicine require a re-examination of Sections IX(A) and IX(B) of *Roe*, 410 U.S. at 156-162, which reserved that question for a later Court when "man's knowledge" is sufficient. Because *Roe* did not determine when the life of a child began, its legal analysis was irrelevant to questions concerning the child's rights, and also the legal inquiry concerning the nature of a mother's interests protectible under the Due Process Clause, once it is found that the child is a human being prior to birth. [See Loce Pet. Pt. IA]. Because of this expressed inability, *Roe*: [1] ignored what would otherwise have been applicable principles of constitutional interpretation as they apply to the rights of the child [see, IIB Loce Pet.]; and [2] misidentified a woman's true interests to the detriment of the woman of this

[6] *Casey* reexamined *Roe* but did not review Sections IX(A) and IX(B) of *Roe* dealing with the question of the humanity and rights of the child.

nation [see, Point II below].

2. The Question of the Mother's Rights is the Sort of Mixed Question of Fact and Law Which Requires Overruling Prior Precedent When New Facts, or New Appreciation of Old Ones, Show that that Precedent Erroneously Applied Constitutional Principles.

Stare decisis is not a bar to the reexamination of *Roe* when new facts, or new appreciation of old ones, require it.[7] Of particular relevance is the dissent of Justice Brandeis[8] in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-413:

> The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution...The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the due process clause...; of cases under the equal protection clause when a question is whether there is any reasonable basis for the classification made by a statute; .. In every such case the decision, ... is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by

[7] The question of when life begins and whether the child has rights prior to birth is one of first impression and *stare decisis* does not apply. If it applies to the interests and rights of the mother, however, there are at least one hundred and seventy-four instances in which this Court has overruled, in whole or in part, its previous constitutional decisions. See Appendix A at A-1-18 bound with Loce Pet. and Loce Pet. p. 10, Fn 6.

[8] The Brandeis opinion has been frequently cited with approval. See *Solario v. U.S.* 483 U.S. 435, 450 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969); *United States v. Scott*, 437 U.S. 82, 101 (1978); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Blackmun, J., dissenting).

> a jury, should not be allowed to obscure its real character. 285 U.S. at 410-411.

Whether a pregnant mother has a protectible interest in taking her child's life under the Fourteenth Amendment and whether a child is a person protected by the Due Process Clause, are both mixed questions of fact and law—this type of determination. In reaffirming that portion of *Roe* which found that the Due Process Clause "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *Casey* expressly declined to state that *Roe* was correctly decided either on constitutional principles[9] or moral grounds,[10] and articulated a reluctance to do so [at 2814]. Only two justices were willing to expressly state *Roe* was legally correct. The Court reaffirmed *Roe* based upon *stare decisis* and special considerations because of a divisive national debate. Whether the principles outlined in *Casey*

[9] "We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly twenty years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedental force that must be accorded to its holding." *Casey*, 505 U.S. , 112 S.Ct. at 2817.

[10] "Some of us as individuals find abortion offensive to our most basic principles of morality,..." *Casey*, 112 S.Ct. at 2806.

8. Neither the Petitioners (the Defendants in Case No. One) nor the Defendants represented by Reinert, Duree & Crane in Case No. Two (all of the Defendants except F.G.R. Management, Inc.) filed a claim against the bankruptcy estate.

9. On October 30, 1992, the bankruptcy court transferred Petitioners' Motion for Withdrawal of Reference and Demand for a Jury Trial to the District Court, where the case (Case No. One) was assigned to the Respondent, The Honorable Stephen N. Limbaugh; a copy of that Order of Transfer is marked as Exhibit "D" and is attached hereto.

10. Case No. Two was also transferred to the United States District Court and assigned to The Honorable Jean C. Hamilton; on February 5, 1993 Judge

Hamilton entered an Order granting the Request for Withdrawal (of all Defendants except F.G.R. Management, Inc.) in Case No. Two on the ground that the Defendants were entitled to a jury trial and the bankruptcy court had no authorization to conduct jury trials; a copy of that Order marked as Exhibit "E" is attached hereto and incorporated herein by reference.

11. On or about April 2, 1993, Plaintiff, David Sosne, filed his Amended Adversary Complaint in Case No. One against Petitioners, again praying for actual damages in the sum of $105,000 plus punitive damages; a copy of the Amended Complaint in Case No. One is marked as Exhibit "F", is attached hereto and incorporated herein by reference.

12. On or about April 2, 1993, Plaintiff, David Sosne, in Case No. One,

filed his Objection to Petitioners' Motion for Withdrawal of Reference, and in the Alternative, his Motion to Remand the case to the United States Bankruptcy Court; a copy of that Objection and Alternative Motion to Remand is marked as Exhibit "G" and is attached hereto and incorporated herein by reference.

13. On about August 24, 1993, Respondent entered his Memorandum and Order in Case No. One remanding Case No. One to the bankruptcy court on the ground that the Amended Adversary Complaint, in Case No. One, states only a claim for violation of the Automatic Stay for which there is no constitutional entitlement to a jury trial; a copy of that Memorandum and Order is marked as Exhibit "H" and is attached hereto and incorporated herein by reference.

14. The Chapter 7 bankruptcy was filed on or about October 15, 1991.

15. Both cases concern the public judgment execution sale of a trademark by the Sheriff of St. Louis County on about October 15, 1991.

16. The same trademark had been assigned by the judgment debtor on January 10, 1991 to F.G.R. Management, Inc.

STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT

(a) ISSUES PRESENTED

(1)Whether Petitioners are entitled to a jury trial on the Complaint for actual and punitive damages alleging they violated the Automatic Stay.

(b) RELIEF SOUGHT

Petitioners move this honorable court for an order compelling Respondent to grant Petitioners' Motion for

Withdrawal from the Bankruptcy Court and to grant Petitioners' Jury Demand, or, in the alternative, prohibiting the Respondent from remanding this case to the Bankruptcy Court and prohibiting the Respondent from denying Petitioners' Jury Demand.

STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

In *Grandfinanciera S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) at 109 S.Ct. 2782, 2789 the Supreme Court stated:

> "The Seventh Amendement provides:
>
> > 'In Suits at common law, where the value and controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .'
>
> We have consistently interpreted the phrase 'Suits at common law' to

> refer to 'suits in which *legal* rights were to be ascertained and determined, in contra distinction to those where equitable rights alone were recognized, and equitable remedies were administered' (citation omitted). Although 'the thrust of the amendment was to preserve the right to jury trial as it existed in 1791,' the Seventh Amendment also applies to actions brought to enforce statutory rights which are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty."

The Supreme Court continued at 109 S.Ct. 2793:

> "The nature of the relief respondent seeks strongly supports our preliminary finding that the right he invokes should be denominated legal rather rather equitable.
>
> *******
>
> 'Where an action is simply

for the recovery . . . of a money judgment, the action is one at law'

****

'Petitioner's contention . . . is that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal. We agree with that contention.' (citation omitted). 'Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. The remedy at law is adequate and complete'.

Indeed, in our view *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 53 S.Ct. 50, 77 L.Ed. 185 (1932), removes all doubt that respondent's cause of action should be characterized as legal rather than equitable. In *Schoenthal*, the trustee in bankruptcy sued in equity to recover alleged preferential payments, claiming that it had no adequate remedy at law. As in this case, the

> recipients of the payments apparently did not file claims against the bankruptcy estate. The Court held that the suit had to proceed at law instead, because the long-settled rule that suits in equity will not be sustained where a complete remedy exists at law, then codified at 28 U.S.C. §384, '<u>serves to guard the right of trial by jury preserved by the Seventh Amendement and to that end it should be liberally construed</u>.'" (emphasis added).

The claim for actual damages in the sum of $105,000 is based upon the sales price obtained by the Sheriff of St. Louis County when he sold the trademark at a judicial execution sale on October 15, 1991.

The claim against Petitioners is a claim for actual damages for the proceeds of that sale, in the sum of $105,000, and for punitive damages which require proof of malicious and outrageous conduct.

David Sosne originally claimed, in Case No. One, that the trademark assigned by the bankruptcy debtor on January 10, 1991 should be considered part of the bankruptcy estate because the transfer was a voidable preference (to an insider since it occurred more than three months before the bankruptcy petition was filed) or was a fraudulent conveyance.

Petitioners submit that David Sosne may not establish a claim for violation of the Automatic Stay without first establishing that the trademark was part of the bankruptcy estate because its prior assignment by the bankruptcy debtor was either a voidable preference or a fraudulent conveyance to F.G.R. Management, Inc.

David Sosne attempted to avoid Petitioners' Jury Demand by eliminating

claims of voidable preference and/or fraudulent conveyance in his Amended Complaint, alleging only a "violation of the Automatic Stay".

The Respondent found that Plaintiff, David Sosne, was entitled to eliminate parts of his claim.

Irrespective of the manner by which Plaintiff, David Sosne, intends to establish that the assigned trademark was part of the bankruptcy estate at the time the bankruptcy petition was filed (nine months after the assignment of the trademark), the claim is for actual money damages, as well as punitive damages, and is legal in nature.

In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 8 L.Ed.2d 44, 82 S.Ct. 894 (1962) the Supreme Court issued a Writ of Mandamus compelling the District Court to

grant defendant's jury demand in a suit for an accounting arising out of alleged trademark violations. The Supreme Court held that the right to trial by jury "cannot be made to depend upon the choice of words used in the pleadings." 8 L.Ed.2d 51.

In *Beacon Theatres, Inc. v. Westover*, 359 U.S.500, 3 L.Ed.2d 988, 79 S.Ct. 948 (1959) the Supreme Court issued a Writ of ' 'amus compelling the District Court to ;t the jury demand of the defendant which had filed a counterclaim alleging treble damages for violation of the anti-trust laws. The plaintiff had attempted to avoid the defendant's right to a jury trial by filing a complaint for declaratory relief before defendant filed its counterclaim alleging violation of the anti-trust laws.

In the case at bar, Plaintiff, David Sosne, in Case No. One, must establish that the trademark was part of the bankruptcy estate by proving that the assignment of January 10, 1991 to F.G.R. Management, Inc. (nine months before the bankruptcy was filed) was either a voidable preferance to an insider or a fraudulent conveyance, before Plaintiff can maintain a claim against Petitioners for allegedly violating the Automatic Stay. Plaintiff, David Sosne, in Case No. One, also must establish the claimed damages of $105,000. Plaintiff, David Sosne, in Case No. One, also must establish that Petitioners intentionally and knowingly violated the Automatic Stay. All of these matters involve questions of fact on which Petitioners are entitled to a jury trial.

No matter what language is used in the Amended Complaint, the claim of Plaintiff, David Sosne, in Case No. One, is legal in nature in that it is a claim for actual damages in the sum of $105,000 and is a claim for punitive damages.

Petitioners are entitled to a jury trial.

The trial court relied upon *Budget Service Co. v. Better Homes of Virgina*, 804 F.2d 289 at 292 (4th Cir. 1986). See Page 4 of the trial court's Memorandum and Order, Exhibit "H".

Budget Service Co. v. Better Homes did not involve a jury demand or a Motion to Withdraw Reference from the Bankruptcy Court to the District Court. In *Budget Service Co. v. Better Homes of Virginia*, the appellant argued that the bankruptcy court did not have authority to hold it

in civil contempt. The appellate court found that the bankruptcy court did have authority to impose sanctions for violation of the Automatic Stay. That case is simply not on point for the issue raised here.

The United States Supreme Court has repeatedly held that mandamus is available to review a district judge's order improperly denying a civil litigant a jury trial as guaranteed by the Seventh Amendment. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), 3 L.Ed.2d 988, 79 S.Ct. 948 and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), 8 L.Ed.2d 44, 82 S.Ct. 894.

WHEREFORE, Petitioners, Reinert & Duree, P.C., Gary Robbins, Robbins and Associates, Inc., Estes & Estes, Inc. and James C. Landes, move the United States

Court of Appeals for the Eighth Circuit to issue a Writ of Mandamus and/or Prohibition directing the Respondent to grant Petitioners' Motion to Withdraw Reference from the bankruptcy court and to grant Petitioners' Jury Demand and to Prohibit Respondent from remanding Case No. One to the bankruptcy court and to prohibit Respondent from denying Petitioners' demand for a jury trial.

/s/ David M. Duree
David M. Duree, #21003
REINERT, DUREE & CRANE, P.C.
812 N. Collins
Laclede's Landing
St. Louis, MO 63102-2174
(314) 621-5743

ATTORNEYS FOR PETITIONERS REINERT & DUREE, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC., and JAMES C. LANDES

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served this 1st day of September, 1993, by delivering the same by hand, addressed to:

The Honorable Stephen N. Limbaugh,
Respondent

Steven Hamburg
SUMMERS, COMPTON, WELLS
& HAMBURG, P.C.
8909 Ladue Road
St. Louis, MO 63124

Attorneys for David Sosne, Trustee

/s/ David M. Duree

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:	
JUST BRAKES CORPORATE SYSTEMS, INC.,	Case No. 91-44835-172
Debtor.	Chapter 7
DAVID A. SOSNE, Trustee,	Adversary No. 92-4384
vs.	
REINERT & DUREE, P.C., n/k/a REINERT, DUREE & COLLINS, P.C. Serve:David M. Duree 812 North Collins Laclede's Landing St. Louis, Missouri 63102-2174	ALL DOCUMENTS REGARDING THIS MATTER MUST BE IDENTIFIED BY BOTH ADVERSARY AND BANKRUPTCY CASE NUMBERS.
and	
GARY ROBBINS, Serve at: 1740 Saddlespur Drive Florissant, MO 63030	
and	
ROBBINS & ASSOCIATES, INC., Serve: William G. Freebersyser 769 Laredo Avenue St. Louis, MO 63138	

BEST AVAIL

and)
)
ROBBINS & ASSOCIATES,)
INC.,)
Serve:)
Carole L. Freebersyser)
769 Laredo Avenue)
St. Louis, MO 63138)
)
and)
)
ESTES & ESTES, INC.,)
Serve:Richard Estes)
680 Lawnview Drive)
Florissant, MO 63031)
)
and)
)
ESTES & ESTES, INC.,)
Serve:Glen Estes)
1065 Flora Lane)
Florissant, MO 63031)
)
and)
)
JAMES C. LANDES,)
Serve at:)
1965 Tricorn Lane)
St. Louls, MO 63131)
)
Defendants.)

ADVERSARY COMPLAINT TO ENFORCE STAY AND ASSESS DAMAGES FOR WILLFUL VIOLATION OF STAY OR, IN THE ALTERNATIVE, COMPLAINT TO COMPEL TURN OVER

COMES NOW David A. Sosne, Trustee, by and through his attorneys, and for his

ABLE COPY

Complaint for an Order to enforce the automatic stay and assess damages for the willful violation of
stay pursuant to 11 USC §§ 362(a) and 362(h) against Reinert & Duree, P.C., n/k/a Reinert, Duree & Collins, P.C., Gary Robbins, Robbins & Associates, Inc., Estes & Estes, Inc. and James Landes ("Defendsnts"), or, in the alternative, for his Complaint to Compel Turn Over of property of the estate pursuant to 11 USC §§ 549 snd 550 directed to Defendants, respectfully states to this Honorable Court as follows:

1. On October 15, 1991, at approximately 9:12 a.m., the Debtor filed its Voluntary Petition for relief under Title 11, Chapter 7 of the United States Code.

2. This Court has jurisdiction over

the subject matter of this proceeding pursuant to 28 USC §§ 151, 157 and 1334 and Local Rule 29 of the United States District Court for the Eastern District of Missouri.

3. This proceeding is a "core" proceeding within the meaning of §157(b)(2)(E) and §157(b)(2)(G) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, which the Court may hear and determine.

4. Defendant Reinert & Duree, P.C., n/k/a Reinert, Duree & Collins, P.C., is a professional corporation duly formed and existing pursuant to the laws of the State of Missouri.

5. Defendant Gary Robbins is a citizen and a resident of the State of Missouri.

6. Defendant Robbins & Associates,

Inc. is a corporation administratively dissolved by the Secretary of State, State of Missouri, and pursuant to Missouri law, is represented by Statutory Trustees William G. Freebersyser and Carol Lee Freebersyser.

7. Defendant Estes & Estes Incorporated is a corporation administretively dissolved by the Secretary of State, State of Missouri, and pursuant to Missouri law, is represented by Statutory Trustees Richard Estes and Glen Estes.

8. Defendant James Landes is a citizen and a resident of the State of Missouri.

9. On or about January 23, 1991, Gary Robbins, Robbins & Associates, Inc., Estes & Estes, Inc. and James Landes, by and through their attorneys

Reinert & Duree, P.C. (collectively the "Defendants") filed suit in the Circuit Court for the County of St. Louis, State of Missouri, in Cause No. 619506 seeking, among other things, an order enjoining a certain trademark transfer from Debtor to F.G.R. Management, Inc., a Missouri corporation.

10. On or about July 16, 1991, Defendants obtained, by default, a permanent injunction against the Debtor and others, barring them from transferring or assigning the trademark and procured an order directing that the trademark be sold by the St.Louis County Sheriff.

11. By Order issued September 30, 1991, in Case No. 619506, the Circuit Court for St. Louis County, State of Missouri, directed the Sheriff of St.

Louis County, State of Missouri to levy upon, seize and take as property of Defendants certain personal property of the Debtor which included the service mark, trademark and trade name "Just Brakes" and the associated goodwill and all other assets of Just Brakes Corporate Systems, Inc., including the "service mark" registration bearing U.S. Service Mark Registration No. 1,309,354. The Court further ordered said personal property of Debtor be sold to satisfy the judgments of Defendants Gary Robbins, individually, James Landes, individually, Richard Estes and Glen Estes as Statutory Trustees of Estes & Estes, Inc. and William G. Freebersyser and Carol Lee Freebersyser as Statutory Trustees of Robbins & Associates, Inc., entered on September 28, 1988, in Cause No. 542798

in St. Louis County Circuit Court.

12. Trustee alleges that at the time the Debtor filed its Petition, Defendants possessed a voidable interest in Service Mark Registration No. 1,309,354 in that the above-described proceedings constituted a preferential transfer within the meaning of 11 USC §547 because it was a transfer for the benefit of Defendants for or on account of an antecedent debt owed by the Debtor before such transfer was made, was made within ninety (90) days before the filing of the bankruptcy Petition, and enabled the Defendants to receive more than such creditors would have received in the bankruptcy case had the transfer not been made.

13. On October 15, 1991, at approximately 10:00 a.m. and immediately

following the Debtor's Petition for Relief, a Sheriff's sale was conducted pursuant to said order of the Circuit Court of the County of St. Louis, State of Missouri in Cause No. 619506, dated September 30, 1991, by the Sheriff of St. Louis County, State of Missouri, which sale purported to transfer the above-described service mark to the highest bidder, which sale of said personal property garnered the sum of One Hundred Five Thousand Dollars ($105,000.00).

14. Trustee alleges that Defendants had actual knowledge of the filing of the bankruptcy Petition and willfully and intentionally continued their efforts to collect a judgment.

15. Immediately before the Sheriff's sale, attorney for F.G.R.

Management, Inc., a party to the State Court proceedings referred to herein, objected to the continuation of said sale and informed Defendants, the Sheriff and the Circuit Court of the County of St. LouLs of the bankruptcy filing by Debtor.

16. By Order entered October 15, 1991, in Cause No. 619506, the Circuit Court permitted the sale to continue and further directed Defendants to hold the funds in escrow pending further order of the Circuit Court.

17. On or about October 24, 1991, Defendants obtained an Order in Cause No. 542798 which directed the Clerk of the Circuit Court, St. Louis County, Missouri to pay-out those sums received at the above described Sheriff's sale; Trustee alleges that the Clerk made payment to "Gary Robbins and Reinert & Duree,

Plaintiff's attorneys" in the sum of One Hundred Thousand Seven Hundred Seventeen Dollars ($100,717.00) on or about October 24, 1991.

18. Trustee alleges that the application of said estate property in satisfaction of a pre-petition voidable transfer constitutes a violation of the automatic stay, 11 USC §362(a),entitling Trustee to damages, including, but not limited to, actual damages, costs and attorneys fees incurred by him in this action to enforce stay, and punitive damages, all as provided pursuant to 11 USC §362(h).

19. In the alternative, Trustee alleges that the post-petition application of estate property in satisfaction of avoidable preferential transfer constitutes a transaction

subject to avoidance pursuant to 11 USC §549, and further alleges that he is entitled to recover those sums so applied pursuant to 11 USC §550.

WHEREFORE, Trustee prays this Honorable Court enter an Order (1) finding that the acts of Defendants constitute a willful violation of the automatic stay as defined under 11 USC §362(a); (2) assessing actual damages in the amount of One Hundred Five Thousand Dollars ($105,000.00) and including, but not limited to, interest from October 15, 1991, costs and attorneys fees incurred by Trustee in this action to enforce stay, and punitive damages, all as provided under 11 USC §362(h); (3) in the alternative, Trustee prays this Court enter an Order avoiding the post-petition transfer of estate

property; (4) enter a judgment in favor of Trustee in the amount of One Hundred Five Thousand Dollars ($105,000.00) pursuant to 11 USC §550; (5) and for such other and further relief as this Court deems just and proper.

SUMMERS, COMPTON, WELLS & HAMBURG
Professional Corporation

By /s/Edward J. Miller, Jr.
EDWARD J. MILLER, JR.
Attorney for Trustee
8909 Ladue Road
St. Louis, Missouri 63124
(314) 991-4999

Dated: September 17, 1992

G:19143

IN THE UNITED STATES BANRRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:	
JUST BRAKES CORPORATE SYSTEMS, INC.,	Case No. 91-46618-172
Debtor.	Chapter 7
DAVID A. SOSNE, Trustee,	ALL DOCUMENTS REGARDING THIS MATTER MUST BE IDENTIFIED BY BOTH ADVERSARY AND BANKRUPTCY CASE NUMBERS.
Plaintiff,	
vs.	
F.G.R. MANAGEMENT, INC., Serve:Laura Roberts Registered Agent 3101 Washington Ave. St. Louis, MO 63103	Adversary No. 92-4473
and	
GARY ROBBINS, Serve at: 1740 Saddlespur Dr. Florissant, MO 63030	
and	
WILLIAM G. FREEBERSYSER, as Statutory Trustee of ROBBINS & ASSOCIATES, INC., Serve at: 769 Laredo Avenue St. Louis, MO 63138	

)
and)
CAROLE L. FREEBERSYSER,)
as Statutory Trustee of)
ROBBINS & ASSOCIATES,)
INC.,)
Serve at:)
769 Laredo Avenue)
St. Louis, MO 63138)
)
and)
)
RICHARD ESTES, as)
Statutory Trustee of)
ESTES & ESTES, INC.,)
Serve at:)
725 Babler Drive)
St. Louis, MO 63031)
)
and)
GLEN ESTES, as)
Statutory Trustee of)
ESTES & ESTES, INC.,)
Serve at:)
1065 Flora Lane)
Florissant, MO 63031)
)
and)
)
JAMES C. LANDES,)
Serve at:)
1965 Tricorn Lane)
St. Louis, MO 63131)
)
Defendants.)

ADVERSARY COMPLAINT

COMES NOW David A. Sosne, duly

appointed Chapter 7 Trustee, by and through his attorneys and for his Adversary Complaint to avoid preferential transfers, to avoid fraudulent conveyance, and for declaratory relief pursuant to 11 USC §§ 547, 548, 550 and 363 and Federal Rule of Bankruptcy Procedure 7001, respectfully states to this Honorable Court as follows:

COUNT I

1. This Court has jurisdiction over this adversary proceeding pursuant to 28 USC §§151, 157 and 1334, and Local Rule 29 of the Unlted States District Court for the Eastern District of Missouri.

2. Thls is a "core" proceeding pursuant to 28 USC §157(a)(2)(E), (F), (H), (R) and (O), which the Court may hear and determine.

3. On October 15, 1991, at approximately 9:12 a.m., Debtor filed its Petition for protection under Chapter 7, Title 11, United States Code.

4. On or about January 10, 1991, Debtor purportedly assigned all right, title and interest in and to a mark registered in the United States Patent and Trademark Office, Registration No. 1,309,354, dated December 11, 1984, to F.G.R.Management, Inc. ("F.G.R.") in exchange for F.G.R.'s assumption of certain pre-existing debts of the Debtor. The assignment was filed by F.G.R. with the United States Patent and Trademark Office on February 4, 1991.

5. Trustee alleges that F.G.R.'s president, Darrell D. Dunn, is a shareholder and director of Debtor.

6. Trustee alleges that the transfer

of Debtor's interest in the registered mark was made within one year of the date of filing of its Petition for protection under Chapter 7 of the Bankruptcy Code and as such constitutes a fraudulent conveyance within the meaning of 11 USC §548 in that the Debtor received less than reasonably equivalent value in exchange for such transfer and said transfer left the business with an unreasonably small capital as the mark constituted virtually the sole asset ofthe Debtor.

7. Trustee further alleges that he may recover from Defendants the transferred property or its proceeds pursuant to 11 USC §550.

WHEREFORE, Trustee prays this Honorable Court enter an Order (a) declaring that the afore-described

transfer was a fraudulent onveyance to Defendant F.G.R. within the meaning of 11 USC §548; (b) voiding the registration by Defendant F.G.R. Management, Inc. of the Assignment of Mark Registration No. 1,309,354 with the United States Patent and Trademark Office; and (c) granting such other and further relief as the Court may deem just and proper includlng the taxing of costs and attorney's fees against Defendant F.G.R.

COUNT II - PREFERENTIAL TRANSFER

COMES NOW Plaintiff and realleges paragraphs 1 and 7 of Count I above as though fully set forth herein.

1. The transfer of said registered mark to F.G.R. constitutes a preference within the meaning of 11 USC §547 as it was a transfer for the benefit of

Defendant F.G.R. for or on account of an antecedent debt owed by Debtor before such transfer was made; such transfer was to an insider as that term is defined under 11 USC §101(31), was made within one year prior to the filing of the Petition, and enabled the Defendant to receive more than such creditor would have received in the bankruptcy case had the transfer not been made.

2. The Trustee may recover from Defendant F.G.R. the transferred mark or its proceeds pursuant to 11 USC §550.

WHEREFORE, Trustee prays this Honorable Court (a) declare that the afore-described transfer was a preferential transfer to Defendant F.G.R. within the meaning of 11 USC §547; (b) enter a judgment in favor of Plaintiff and against Defendant F.G.R. Management,

Inc. for the recovery of the mark or its proceeds, together with interest from the date of demand; and (c) order such other and further relief as the Court may deem just and proper including the taxing of costs against Defendant F.G.R.

COUNT III - DECLARATORY RELIEF

COMES NOW Plaintiff and realleges paragraphs 1 through 7 of Count I above and paragraphs 1 and 2 of Count II above as thoughfully set forth herein.

1. On October 15, 1991, at approximately 10:00 a.m., and immediately following Debtor's Petition for Relief, a Sheriff's sale was conducted pursuant to an Order of the Circuit Court of the County of St. Louis, State of Missouri, in Cause No. 619506, dated September 30, 1991, by the Sheriff of St. Louis County,

State of Nissouri, which sale purported to transfer the above-described service mark bearing U.S. Service Registration Mark No. 1,309,354 to the highest bidder, Just Brakes Corporation, for the sum of One Hundred Five Thousand Dollars ($105,000.00).

2. The transfer of said Service Mark constitutes a post-petition transaction by Defendants Robbins, William Freebersyser, Carole Freebersyser, Richard Estes, Glen Estes and James C. Landes subject to avoidance by the Trustee as it was a transfer that occurred after the commencement of the case that was not authorized under the Code nor by Order of this Court.

3. The Trustee may avoid said transfer pursuant to 11 USC §549 and recover the property transferred or the

value of such property pursuant to 11 USC §550 or, in the alternative, may seek an Order authorizing the adoption and incorporation of said transfer pursuant to 11 USC §363(b)(1).

WHEREFORE, Trustee prays this Honorable Court enter an Order pursuant to 11 USC §363(b)(1) permitting Trustee to adopt and incorporate the sale of personal property of the estate described as the service mark, trade mark and trade name "Just Brakes" and the associated good will, and all other assets of Just Brakes Corporate Systems, Inc., including the service mark registration bearing U.S. Service Nark Registration No. 1,309,354 issued on or about December 11, 1984, for the mark "Just Brakes", to Just Brakes Corporation, 1931 Market Center Blvd, Dallas, Texas 75207, for the sum of

One Hundred Five Thousand Dollars ($105,000.00) and for such other and further relief as the Court may deem just and proper in the premises.

Respectfully submitted,

SUMMERS, COMPTON, WELLS & HAMBURG
Professional Corporation

By /s/Edward J. Miller, Jr.
EDWARD J. MILLER, JR.
Attorney for Trustee
8909 Ladue Road
St. Louis, Missouri 63124
(314) 991-4999

Dated: 10/13/92

G:18743

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	
	)	Case No.
	)	91-46618-172
JUST BRAKES CORPORATE SYSTEMS, INC.,	)	Chapter 7
Debtor.	)	
	)	
DAVID A. SOSNE, Trustee,	)	
Plaintiff,	)	
vs.	)	Adversary No. 92-4384
REINERT & DUREE, P.C. n/k/a REINERT, DUREE & COLLINS, P.C.	)	
GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ROBBINS & ASSOCIATES, INC., ESTES & ESTES, INC., ESTES & ESTES, INC., and JAMES C. LANDES,	)	
Defendants.	)	

JURY DEMAND, MOTION TO WITHDRAW REFERENCE TO THE BANKRUPTCY COURT, AND ANSWER

Come now Defendants, Reinert & Duree, P.C. n/k/a Reinert, Duree &

Collins, P. C., Gary Robbins, Robbins & Associates, Inc., Robbins & Associates, Inc., Estes & Estes, Inc., Estes & Estes, Inc., and James C. Landes, and for their jury demand, their Motion to Withdraw Reference to the Bankruptcy Court and for their answer to the Adversary Complaint, state:

JURY DEMAND

These Defendants, Reinert & Duree, P.C. n/k/a Reinert, Duree & Collins, P. C., Gary Robbins, Robbins & Associates, Inc., Robbins & Associates, Inc., Estes & Estes, Inc., Estes & Estes, Inc., and James C. Landes, and each of them, demand trial by a jury on all issues, all claims and all counts, pursuant to Federal Rule of Civil Procedure 38 and pursuant to the Seventh Amendment to the Constitution of the

United States.

In further support of this demand for a jury trial, these Defendants state that none of them have filed or submitted or otherwise made a claim against the bankruptcy estate.

These Defendants further state that their right to a jury trial in this matter is established by Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) and In Re Great American Mfg. and Sales, Inc., 129 B.R. 633 (C.D. Cal. 1991).

MOTION TO WITHDRAW REFERENCE TO THE BANKRUPTCY COURT

These Defendants, Reinert & Duree, P.C. n/k/a Reinert, Duree & Collins, P. C., Gary Robbins, Robbins & Associates, Inc., Robbins & Associates, Inc., Estes & Estes, Inc., Estes & Estes, Inc., and

James C. Landes, move to withdraw reference to the Bankruptcy Court, and to transfer this case back to the United States District Court, on the grounds that these Defendants are entitled to a trial by jury, and that the appropriate means of according these Defendants the right to a jury trial is to withdraw the reference of this matter to the bankruptcy court, and to transfer this matter back to the United States District Court, in accordance with In Re National Enterprises, Inc., 128 B.R. 956 (E.D. Va. 1991).

ANSWER

For their answer to the Adversary Complaint, Defendants, Reinert & Duree, P.C. n/k/a Reinert, Duree & Collins, P. C., Gary Robbins, Robbins & Associates, Inc., Robbins & Associates,

Inc., Estes & Estes, Inc., Estes & Estes, Inc., and James C. Landes, state:

1. They deny the allegations of ¶1.

2. They deny the allegations of ¶2.

3. They deny the allegations of ¶3.

4. They deny the allegations of ¶4 and state further that no entity by either of those names exists.

5. They admit the allegations of ¶5.

6. They deny the allegations of ¶6.

7. They deny the allegations of ¶7.

8. They admit the allegations of ¶8.

9. They deny the allegations of ¶9.

10. They deny the allegations of ¶10.

11. They deny the allegations of ¶11.

12. They deny the allegations of ¶12.

13. They deny the allegations of ¶13.

14. They deny the allegations of ¶14.

15. They deny the allegations of ¶15.

16. They deny the allegations of ¶16.

17. They deny the allegations of ¶17.

18. They deny the allegations of ¶18.

19. They deny the allegations of ¶19.

20. For further answer, these defendants state that the complaint fails to state a claim or cause of action upon which the relief requested, or any relief, may be granted.

21. For further answer, these defendants state that Just Brakes Corporate Systems, Inc. assigned all of its rights, title and interest in the alleged trademark described in the Adversary Complaint to F.G.R. Management, Inc. on or about January 10, 1991, and definitely prior to February 4, 1991, and Just Brakes Corporate Systems, Inc. thereby divested itself of all right, title and interest of any kind in said alleged trademark and, therefore, neither this court nor the trustee, plaintiff,

David A. Sosne, have any jurisdiction or rights with respect to said alleged trademark.

WHEREFORE, Defendants, Reinert & Duree, P.C. n/k/a Reinert, Duree & Collins, P. C., Gary Robbins, Robbins & Associates, Inc., Robbins & Associates, Inc., Estes & Estes, Inc., Estes & Estes, Inc., and James C. Landes, pray for dismissal of the complaint at Plaintiff's costs.

DATED THIS 22nd day of October, 1992.

/s/David M. Duree
David M. Duree, #21003
REINERT, DUREE & CRANE, P.C.
812 N. Collins
Laclede's Landing
St. Louis, MO 63102-2174
(314) 621-5743

ATTORNEYS FOR DEFENDANTS
REINERT & DUREE, P.C. n/k/a
REINERT, DUREE & COLLINS, P.C.,
GARY ROBBINS, ROBBINS &
ASSOCIATES, INC., ROBBINS &
ASSOCIATES, INC., ESTES &
ESTES, INC., ESTES & ESTES,
INC., and JAMES C. LANDES

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served this 22ND day of OCTOBER, 1992, by depositing the same in the U.S. Mail, proper first-class postage prepaid, addressed to:

Edward J. Miller, Jr.
SUMMERS, COMPTON, WELLS
& HAMBURG, P.C.
8909 Ladue Road
St. Louis, MO 63124

/s/ David M. Duree

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re	)	
	)	
JUST BRAKES CORPORATE SYSTEMS, INC.,	)	Adv. No. 92-4384-172
	)	
Debtor,	)	
	)	
DAVID A. SOSNE, TRUSTEE,	)	Case No. 91-46618-172
	)	
Plaintiff,	)	
	)	**CHAPTER 7 PROCEEDING**
vs.	)	
	)	
REINERT & DUREE, P.C. n/k/a REINERT, DUREE & COLLINS, P.C., GARY ROBBINS, ROBBINS & ASSOCIATES, INC., ROBBINS & ROBBINS ASSOCIATES, INC., ESTES & ESTES, INC., ESTES & ESTES, INC., and JAMES C. LANDES,	)	
	)	
Defendants.	)	

O R D E R

At Saint Louis, in this District, this 30th day of October, 1992.

Pursuant to Rule 5011 of the Federal Rules of Bankruptcy Procedure, this

Adversary Proceeding including the following pending matters is transferred to the United States District Court for the Eastern District of Missouri:

1. Defendants' Motion for Withdrawal of Reference.
2. Defendants' Demand for a Jury Trial.
3. Plaintiff's Motion to Consolidate.

/s/ James J. Barta
JAMES J. BARTA
U.S. Bankruptcy Judge

Copy mailed to:

Office of United States Trustee
815 Olive Street, Suite 320-324
St. Louis, MO 63101

David M. Duree
Reinert & Duree, P.C.
Attorneys for Defendants
812 North Collins
Laclede's Landing
St. Louis, MO 63102-2174

David A. Sosne
Trustee/Plaintiff
8909 Ladue Road
St. Louis, MO 63124

Edward J. Miller, Jr.
Attorney for Trustee/Plaintiff
8909 Ladue Road
St. Louis, MO 63124

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	Consolidated
	)	Adversary
JUST BRAKES CORPORATE	)	Proceedings
SYSTEMS, INC.,	)	Bank. No.
	)	91-46618-172
Debtor,	)	Adv. No.
	)	92-4473-172
_____	)	
	)	
DAVID A. SOSNE, Trustee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No.
	)	4:92CV002298 JCH
F.G.R. MANAGEMENT, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on Defendant's Motion to Withdraw to District Court. Plaintiff has not filed a response to the motion.

Defendants correctly contend that they have the right to trial by jury based on the fraudulent conveyance and

preferential transfer claims in the Complaint. See Granfinanciera S.A. v.Norbera, 492 U.S. 33 (1989). Defendants, therefore, suggest that the appropriate means of according their right to jury trial is to withdraw the reference of this matter to the bankruptcy court, and to transfer the matter back to this Court.

The District Court may withdraw any proceeding from the bankruptcy court on the timely motion of a party, for cause shown. 28 U.S.C. §157(d). Because the Court of Appeals for the Eighth Circuit has determined that bankruptcy courts have no statutory authorization to conduct jury trials, In re United Missouri Bank, 901 F.2d 1449, 1457 (8th Cir. 1990), the withdrawal of the reference of this matter is appropriate.

ACCORDINGLY,

IT IS HEREBY ORDERBD that Defendants' Motion to Withdraw to District Court is GRANTED.

Dated this 5th day of February, 1993.

/s/Jean C. Hamilton
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	
JUST BRAKES CORPORATE SYSTEMS, INC.,	U.S. Bankruptcy Case No. 91-46618-172
Debtor.	
DAVID A. SOSNE, Trustee,	United States Bankruptcy Adversary No. 92-4384
Plaintiff,	
vs.	
REINERT & DUREE, P.C., n/k/a REINERT, DUREE & CRANE, P.C., et al.,	United States District Court No.4:92CV2297SNL
Defendants.	

AMENDED ADVERSARY COMPLAINT TO ENFORCE STAY AND ASSESS DAMAGES FOR WILLPUL VIOLATION OF STAY

COMES NOW David A. Sosne, Trustee, by and through his attorneys, and for his Complaint for an Order to enforce the automatic stay and assess damages for the willful violation of stay pursuant to 11 U.S.C. §§362(a) and 362(h) against

Reinert & Duree, P.C., n/k/a Reinert, Duree & Crane, P.C., Gary Robbins, Robbins & Associates, Inc., Estes & Estes, Inc., and James Landes ("Defendants"), respectfully states to this Honorable Court as follows:

1. On October 15, 1991, at approximately 9:12 a.m., the Debtor filed its Voluntary Petition for relief under Title 11, Chapter 7 of the United States Code.

2. The Bankruptcy Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334 and Local Rule 29 of the United States District Court for the Eastern District of Missouri.

3. This proceeding is a "core" proceeding within the meaning of §157(b)(2)(G) of the Bankruptcy

Amendments and Federal Judgeship Act of 1984, which the Court may hear and determine.

4. Defendant Reinert & Duree, P.C., n/k/a Reinert, Duree & Crane, P.C., is a professional corporation duly formed and existing pursuant to the laws of the State of Missouri.

5. Defendant Gary Robbins is a citizen and a resident of the State of Missouri.

6. Defendant Robbins & Associates, Inc. is a corporation administratively dissolved by the Secretary of State, State of Missouri, and pursuant to Missouri law, is represented by tatutory Trustee William G. Freebersyser and Carol Lee Freebersyser.

7. Defendant Estes & Estes, Inc. is a corporation administratively dissolved

by the Secretary of State, State of Missouri, and pursuant to Missouri law, is represented by Statutory Trustees Richard Estes and Glen Estes.

8. Defendant James Landes is a citizen and a resident ofthe State of Missouri.

9. On September 28, 1988, Defendants, represented by Defendant Reinert & Duree, P.C., n/k/a Reinert, Duree & Crane,P.C., recovered a judgment against the Debtor in the Circuit Court for this County of St. Louis, in Cause No. 542798 in the principal sum of $133,033.33.

10. On or about January 23, 1991, Gary Robbins, Robbins & Associates, inc., Estes & Estes, Inc. and James Landes, by and through their attorneys Reinert & Duree, P.C. (collectively the

"Defendants") filed suit in the Circuit Court for the County of St. Louis, State of Missouri, in Cause No. 619506 seeking, among other things, an order enjoining a certain trademark transfer from Debtor to F.G.R. Management, Inc., a Missouri corporation, and Defendants obtained on January 23, 1991, an order restraining the Debtor from transferring the property.

11. On or about July 16, 1991, Defendants obtained, by default, a permanent injunction against the Debtor and others, barring them from transferring or assigning the trademark and procured an order directing that the trademark be sold by the St.Louis County Sheriff.

12. By Order issued September 30, 1991, in Case No. 619506, the Circuit

Court for St. Louis County, State of Missouri, directed the Sheriff of St. Louis County, State of Missouri, to levy upon, seize and take as property of Defendants certain personal property of the Debtor which included the service mark, trademark and trade name "Just Brakes" and the associated goodwill and all other assets of Just Brakes Corporate Systems, Inc., including the service mark registration bearing U.S. Service Mark Registration No. 1,309,354. The Court further ordered said personal property of Debtor be sold to satisfy the judgments of Defendants Gary Robbins, individually, James Landes, individually, Richard Estes and Glen Estes as Statutory Trustees of Estes & Estes, Inc. and William G. Freebersyser and Carol Lee Freebersyser as Statutory Trustees of Robbins &

Associates, Inc., entered on September 28, 1988, in Cause No. 542798 in St. Louis County Circuit Court.

14. On October 15, 1991, at approximately 10:00 a.m. and immediately following the Debtor's Petition for Relief, a Sheriff's sale was conducted pursuant to said order of the Circuit Court of the County of St. Louis, State of Missouri, in Cause No. 619506, dated September 30, 1991, by the Sheriff of St.Louis County, State of Missouri, which sale purported to transfer the above-described service mark to the highest bidder, which sale of said personal property garnered the sum of One Hundred Five Thousend Dollars ($105,000.00).

15. Trustee alleges that Defendants had actual knowledge of the filing of the

bankruptcy petition and willfully and intentionally continued their efforts to collect a judgment.

16. Immediately before the Sheriff's sale, attorney for F.G.R. Management, Inc., a party to the State Court proceedings referred to herein, objected to the continuation of said sale and informed Defendants, the Sheriff and the Circuit Court of the County of St. Louis, of the bankruptcy filing by Debtor.

17. By Order entered October 15, 1991, in Cause No. 619506, the Circuit Court permitted the sale to continue and further directed Defendants to hold the funds in escrow "until the Debtor; and others exhausted their legal remedies contesting the validity of the October 15, 1991 sale, or until further order of

Court.

18. On or about October 14, 1991, Defendants obtained an Order in Cause No. 542798 which directed the Clerk of the Circuit Court, St. Louis county, Missouri, to pay-out those sums received at the above-described Sheriff's sale; Trustee alleges that the Clerk made payment to "Gary Robbins and Reinert & Duree, Plaintiff-s attorneys" in the sum of One Hundred Thousand Seven Hundred Seventeen Dollars ($100,717.00) on or about October 24, 1991.

19. This action of Defendants was in willful violation of 0the automatic stay, U.S.C. §362(a)(2), (3), (4), 95) and (6) and Plaintiff is entitled to damages, costs and attorney fees.

WHEREFORE, Trustee prays this Honorable Court enter an Order (1)

finding that the acts of Defendants constitute a willful violation of the automatic stay as defined under 11 U.S.C. §362(a); (2) assessing actual damages in the amount of One Hundred Five Thousand Dollars ($105,000.00) and including, but not limited to, interest from October 15, 1991, costs and attorneys fees incurred by Trustee in this action to enforce stay, and punitive damages, all as provided under 11 U.S.C. §362(h), and (3) for such other and further relief as this Court deems just and proper.

SUMMERS, COMPTON, WELLS & HAMBURG
PROFESSIONAL CORPORATION

BY /s/ Steven M. Hamburg
STEVEN M. HAMBURG
Attorney for Trustee
8909 Ladue Road
St. Louis, Missouri 63124
(314) 991-4999

Dated: 4-2-92

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing was served upon the parties of record by depositing same in the United States Mail, postage prepaid, on this 2 day of April, 1993, addressed as follows:

Mr. David M. Duree
Reinert, Duree & Crane
812 North Collins
St. Louis, MO 63102-2174
Attorney for Defendants

/s/ Steven M. Hamburg
STEVEN M. HAMBURG

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	)	
	)	
JUST BRAKES CORPORATE SYSTEMS, INC.,	)	U.S. Bankruptcy Case No. 91-46618-172
Debtor.	)	
	)	
DAVID A. SOSNE, Trustee,	)	United States Bankruptcy
Plaintiff,	)	Adversary No. 92-4384
	)	
vs.	)	United States District Court
REINERT & DUREE, P.C., n/k/a REINERT, DUREE & CRANE, P.C., et al.,	)	No.4:92CV2297SNL
Defendants.	)	

PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION FOR WITHDRAWAL OF REFERENCE AND IN THE ALTERNATIVE MOTION TO REMAND TO THE UNITED STATES BANRRUPTCY COURT

COMES NOW Plaintiff, by and through his attorney, and states as follows:

1. That the Amended Complaint filed herein, while a core proceeding, is not involved with state created rights or

rights protectable at common law and therefore defendant is not guaranteed a jury trial pursuant to the Seventh Amendment on the issues raised therein.

2. That withdrawal of the reference with respect to this matter as amended is inappropriate and improper and matters with respect to willful violations of the automatic stay are summary proceedings integrally involved in ths administration of the federal bankruptcy code for which a jury trial is not available to Defendants.

3. That as a consequence of the filing of the Amended Complaint, it is appropriate for this Court to remand the matter back to the Bankruptcy Court as the Amended Complaint deals exclusively with allegations that Defendants have violated the automatic stay of 11 U.S.C.

Section 362.

WHEREFORE, Plaintiff prays that this Court remand the Amended Adversary Complaint to the United States Bankruptcy Court for determination and disposition.

SUMMERS, COMPTON, NELLS & HAMBURG
PROFESSIONAL CORPORATION

BY /s/ Steven M. Hamburg
STEVEN M. HAMBURG
Attorney for Trustee
8909 Ladue Road
St. Louis, Missouri 63124
(314) 991-4999

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing was served upon the parties of record by depositing same in the United States Mail, postage prepaid, on this 2 day of April, 19 93, addressed as follows:

Mr. David M. Duree
Reinert, Duree & Crane
812 North Collins
St. Louis, MO 63102-2174
Attorney for Defendants

/s/ Steven M. Hamburg

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	
JUST BRAKES CORPORATE SYSTEMS, INC.,	U.S. Bankruptcy Case No. 91-46618-172
Debtor.	
DAVID A. SOSNE, Trustee,	United States Bankruptcy Adversary No. 92-4384
Plaintiff,	
vs.	U. S. District Court Cause No. 4:92CV2297SNL
REINERT & DUREE, P.C., n/k/a REINERT, DUREE & CRANE, P.C., ET. AL.,	
Defendants	

MEMORANDUM AND ORDER

This matter is before the Court on several pending motions regarding this Court's exercise of jurisdiction of this case. Currently pending before the Court are the defendants' motion to withdraw the reference (#5-1), filed November 16, 1992 and motion for summary judgment

(#11-1), filed April 20, 1993; and the plaintiff Trustee's motions to consolidate (#6-1 and #8-1), filed November 16 and December 11, 1992 respectively, and motion to remand (#15), filed April 23, 1993. This memorandum and order will only address the motion to withdraw the reference, the motions to consolidate, and the motion to remand.

On or about September 18, 1992 plaintiff Trustee filed an adversary complaint in the bankruptcy court seeking recovery for violations of the United State Bankruptcy Code, Sections 549 and 550 (preferential transfer of the Debtor's property) and for violations of the automatic stay provisions of Section 362. This complaint shall be referred to as Complaint 1.

On or about October 13, 1992

plaintiff Trustee filed a companion adversary complaint in the bankruptcy court against several of the named defendants in Complaint 1, plus additional named defendants. This complaint also alleged violations of the United States Bankruptcy Code through act(s) of fraudulent conveyance and preferential transfers. This complaint shall be referred to as Complaint 2.

On or about October 22, 1992 the defendants in both complaints filed a jury demand and motions to withdraw the reference. On orabout October 30, 1992 both complaints and their respective motions were transferred to the district court. Complaint 1 and its motions were assigned to the undersigned as Cause No. 92CV2297; Complaint 2 was assigned to Judge Jean C. Hamilton as Cause No.

92CV2298.

On February 5, 1993 Judge Hamilton granted the defendants' motion to withdraw the reference. She determined that the defendants have a right to trial by jury based on the fraudulent conveyance and preferential transfer claims in Complaint 2. Since bankruptcy courts have no statutory authorization to conduct jury trials, the withdrawal of the reference was proper. See, Order of Judge Jean C. Hamilton, filed February 5, 1993, Cause No.4:92CV2298.

Meanwhile, with regard to Complaint 1 in this Court, the defendants' motion to withdraw the reference and the plaintiff Trustee's motions to consolidate were still pending. Plaintiff Trustee then received leave to file an amended adversary complaint (Complaint

1A) deleting all the claims duplicative of Complaint 2. Complaint 1A seeks damages for recovery of violation of the automatic stay only.

The plaintiff Trustee has filed a motion to remand seeking to transfer this action back to the bankruptcy court for disposition. He avers that although actions for violations of the automatic stay are core proceedings, they are not the type of core proceeding which are subject to the Seventh Amendment right to a jury trial. He contends that the instant action does not involve either state created rights nor rights protectable at common law, therefore the defendants are not constitutionally entitled to a jury trial. The defendants, on the other hand, contend that in order for the Trustee to pursue

his claim for violation of the automatic stay, he must first establish that the Debtor had a protected interest in the subject property (trademark) prior to the date the bankruptcy petition was filed (October 15, 1991). They further contend that although the amended adversary complaint eliminates the claim that the January 10, 1991 assignment of the subject trademark by the Debtor was a voidable preference, this issue must first be resolved before the issue of the alleged violation of the automatic stay can be addressed. They argue that they are entitled to have the issue of the voidable preference tried in the district court by a jury.

The amended adversary complaint that presently stands before this Court states only a claim for violation of the

automatic stay. Actions for violations of the automatic stay, while core proceedings, do not entitle the participants to a jury trial. Historically, core proceedings which involve state created rights or rights created by common law have invoked the Seventh Amendment right to trial by jury. Granfinaciera. S.A. v. Nordberg, 492 U.S.33 (1989). However, an action for violation of the automatic stay involves only federal rights created under the bankruptcy code, therefore there is no constitutional entitlement to a jury trial. Budget Service Co. v. Better Homes of Virginia, 804 F.2d. 289, 292(4th Cir. 1986).

As for the defendants' concerns regarding the issue of avoidable preference being tried first in the

district court by ajury, the Court finds no conflict. Presently pending before Judge Hamilton is a similar complaint which presents claims of fraudulent conveyance and preferential transfer. The defendants will get their opportunity to have these claims tried before a jury. Whether these claims will be resolved prior to any hearing on the complaint regarding the alleged violation of the automatic stay is perhaps something to be worked out among the parties, Judge Hamilton and the bankruptcy court.

The plaintiff Trustee has elected to eliminate one of his legal theories for recovery. The defendants have failed to show this Court why he is not entitled to do this. By eliminating one of his claims, the action becomes a summary proceeding which significantly involves

the administration of the Bankruptcy Code; a matter best left to the bankruptcy court to adjudicate.

Accordingly,

IT IS HEREBY ORDERED that the defendants' motion to withdraw the reference (#5-1) be and is DENIED.

IT IS FURTHER ORDERED that the plaintiff Trustee's motions to consolidate (#6-1 and #8-1) be and are DENIED.

IT IS FINALLY ORDERED that the plaintiff Trustee's motion to remand (#15-1) be and is GRANTED. This cause of action, along with any remaining motions, shall be remanded to the United States Bankruptcy Court, Eastern District of Missouri, Eastern Division pursuant to 28 U.S.C. §1452(b).

Dated this 24th day of August, 1993.

/s/ Stephen N. Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For The Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101
(314) 539-3600
Michael E. Gans
Clerk of Court

September 8, 1993

Mr. Edward J. Miller Jr.
SUMMERS & COMPTON
8909 Ladue Road
St. Louis, MO 63124

Re: 93-3203EMSL In Re: Reinert & Duree

Dear Counsel:

We have today received directions from the court directing that a response to the writ of mandamus/prohibition be filed in this case by counsel for the plaintiff below. Please file a response with this office by September 19, 1993.

Sincerely,

/s/ Michael E. Gans jh
Michael E. Gans
Clerk of Court

jmh
Enclosure(s)

cc: Hon. Stephen Limbaugh
David Maxwell Duree
Robert St. Vrain

District Court Case Number:
92-2297 CV SNL

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REINERT, & DUREE, P.C., GARY ROBBINS, ROBBINS AND ASSOCIATES, INC., ESTES & ESTES, INC., AND JAMES C. LANDES,	Eighth Circuit No. 93-3203EMS
Petitioners,	United States Bankruptcy Case No.91-46618-172
vs.	United States Bankruptcy Adversary No. 92-4384
THE HONORABLE STEPHEN N. LIMBAUGH,	United States District Court
Respondent.	Cause No. 4:92CV2297 SNL Honorable Stephen N. Limbaugh, District Judge Presiding

RESPONDENT'S SUGGESTIONS OF LAW IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

COMES NOW Respondent, the Honorable Stephen N. Limbaugh, by and through his counsel, and for his suggestions in opposition to the Petitioner's Petition for Writ of Mandamus and/or Prohibition,

submits the following memorandum.

STATEMENT OF FACTS

The underlying lawsuit was originally filed on September 18, 1992 in the United States Bankruptcy Court by David A. Sosne, the duly appointed and acting Chapter 7 Trustee ("Trustee") in the Bankruptcy proceeding of Just Brakes Corporate Systems, Inc.("Debtor"), being case number, 91-46618-172 (Bkcy. E.D. Mo.). On or about October 22, 1992, Petitioners, the Defendants in the adversary complaint, filed their Jury Demand, Motion to Withdraw Reference to the Bankruptcy Court and Answer. On October 30, 1992, the Honorable James J. Barta, United States Bankruptcy Judge, entered an Order pursuant to Rule 5011 of the Federal Rules of Bankruptcy Procedure, by which all pending matters

were transferred to the United States District Court for the Eastern District of Missouri including the Motion for Withdrawal of Reference and Demand for Jury Trial together with the Trustee's Motion to Consolidate this cause into a companion adversary proceeding now pending before Judge Jean C. Hamilton.[1] Acknowledgment of the transfer was given to the Trustee on or about November 19, 1992 and the underlying case was assigned to Honorable Stephen N. Limbaugh.

Simultaneously with the filing of the Trustee's Objection and Motion to Remand, the Trustee filed an Amended Complaint which sought only recovery in the form of damages for alleged willful conduct in violation of the automatic stay. The Amended Complaint alleged that

---

[1] Case No. 4:92CV2298JCH.

subsequent to the Debtor's filing of a Petition with the Bankruptcy Court, the Petitioners proceeded to continue judicial process against the Debtor by enforcing against the Debtor and property of the estate a judgment obtained before the commencement of the case; that the Petitiones acted to obtain possession of property of the estate; that the Petitioners enforce their lien against property of the estate and that the Petitioners' actions were to enforce a lien against property of the estate which secured a claim that arose beforethe commencement of the case. Quite simply, Petitioners improperly continued their execution efforts to recover property of the estate on a claim against the Debtor that arose before the commencement of the case.

On August 2, 1993, the Honorable Stephen N. Limbaugh filed the Memorandum and Order by which the Court, inter alia, granted the Trustee's Motion to Remand after finding there is no entitlement to a jury trial in an action for violation of the automatic stay imposed by 11 USC §362. See Memorandum and Order attached hereto as Exhibit A. Thereafter, Petitioners filed the subject Petition for Writ of Mandamus and/or Prohibition with this Court in which they request that Respondent be compelled to grant Petitioners' request for a jury trial. Insofar as the Respondent correctly determined the issues before him and the Petitioners are not entitled to a jury trial on the question of whether their actions violated the automatic stay, Petitioner's request should be denied.

DISCUSSION

The sole issue before this Court is whether there exists a right to a jury trial in an action to determine whether a party violated the automatic stay.[2] Petitioners allege that they are entitled to a jury trial pursuant to the Seventh Amendment, Rule 38 of the Federal Rules of Civil Procedure and under Granfinanciera, S.A. v. Nordbey, 492 U.S. 33 (1989). See Defendant's Suggestion of

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[2] The petitioners apparently misunderstood Respondent's Memorandum and Order and are confused with respect to the matters raised in the two separate cases which were pending in the District Court. They have misstated the issue to this Court. Although Petitioners assert that the issue before this Court involves the nature of the Debtor's interest in the trademark, in fact the sole issue relates to the right to a jury trial in an automatic stay violation proceeding. Respondent Limbaugh's Memorandum states that the issue relating to Debtor's interest remains pending before Judge Hamilton in the related proceeding.

Law in Opposition to Plaintiff's Motion to Remand. Insofar as neither the Seventh Amendment, Rule 38 nor Granfinanciera entitle petitioners to a jury trial in an automatic stay violation proceeding, the Court has no basis to issue a Writ and Respondent's Memorandum should be upheld.[3]

A. PETITIONERS DO NOT HAVE A SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

In Granfinanciera. S.A. v. Nordbey, 492 U.S. 33 (1989), the Supreme Court set forth the analysis to employ in determining when the Seventh Amendment

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[3] Rule 38(a) of the Federal Rules of Civil Procedure states that the right to a jury trial as declared by the Seventh Amendment or as granted by a federal statutory provision shall be preserved. For the reasons set forth below in parts A and B, respectively, petitioners are not entitled to a jury trial
pursuant to Rule 38.

right to a jury trial attaches in a bankruptcy case.[4] A proper determination of whether the Seventh Amendment confers a right to a jury trial in an action heard in Bankruptcy Court entails a two-part inquiry:

> First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts oflaw and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature.[5]

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[4] At issue in Granfinanciera was whether a party who had not filed a claim against the bankruptcy estate had a right to jury trial in an action by the Trustee to recover an allegedly fraudulent transfer of money.

[5] The Supreme Court added that "if these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim

492 U.S. at 42 (citing Tull v. United States, 481 U.S. 412, 417-18 (1987)). In order for the Court to determine Petitioner's right to a jury trial under the Seventh Amendment, the nature of the claim and the relief requested must be examined. In re Hooper, 112 B.R. 1009, 1011-12 (9th Cir. BAP 1990). Applying the Supreme Court's holding to the instant case, Petitioners have no Seventh Amendment right to a jury trial on the issue of the violation of the automatic stay.

First, an action for violation of the automatic stay is a type of equitable

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to a non-Article III adjudicative body that does not use the jury as a fact finder." Id. Because Petitioners are not entitled to a jury trial under the first two components of the Granfinanciera test, this Court need not make a determination under this third component of the test.

claim for which a party cannot obtain a jury trial. Automatic stay proceedings, like actions to recover preferences and fraudulent conveyances, are core proceedings. See 28 USC §157(b) (1988); see also Budget Service Co. v. Better Homes of Virginia, 804 F.2d 289, 292 (4th Cir. 1986). Unlike actions to recover preferential transfers, however, automatic stay proceedings historically have been equitable actions tried without juries and "the violation . . . charged is an intrigal part of the federal rights created under the Bankruptcy Code." Budget, supra, at 292. Indeed, Petitioners cite no authority indicating that the issue of an automatic stay violation would have been determined by a jury trial.

Moreover, the genesis of bankruptcy

relief is founded in proceedings brought in English courts of equity. Hooper, supra, at 1012 (citing 1 Norton Bankruptcy Law and Practice, §16.02 (1981)). The automatic stay, and issues surrounding its violation, modification and annulment, are "inextricably bound to and arise only in connection with bankruptcy relief because such issues concern whether the debtor will be granted the protection and benefits of bankruptcy." Id. The importance of the automatic stay is echoed in the legislative history of 11 USC §362 which provides, in part:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection

> efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

HR. No. 95-595, 95th Cong., 1 Sess. 340-42 (1977); S.R.No. 95-989, 95th Cong., 2nd Sess. 54-55 (1978); reprinted in 1978 U.S.Code Cong. & Admin. News 5787, 5840, 6296-97. The close tie of the protection and benefits afforded a debtor in bankruptcy to the historically equitable bankruptcy process provides further indication of the equitable roots of automatic stay issues. An examination of the remedies sought also indicates that the automatic stay violation issue is equitable in nature. The ultimate relief sought by the Trustee is a

determination that, as to particular collection efforts, the petitioners violated the automatic stay and the recovered over $100,000.00 which was received after the post-bankruptcy filing execution sale. See Amended Adversary Complaint. Because of the equitable nature of the remedy sought and the historical equitable roots of automatic stay violation issues, under the Supreme Court's test announced in Granfinanciera, the Seventh Amendment does not entitle

Petitioners to a jury trial on the iusse of whether they violated the automatic stay. Therefore, to the extent Petitioners demand a jury trial pursuant to the Seventh Amendment, their demand finds no support in the law and the matter should be remanded to the Bankruptcy Court for a non-jury trial.

Accord Budget, supra, at 292.

B. PETITIONERS DO NOT HAVE A STATUTORY RIGHT TO A JURY TRIAL.

Neither do the Petitioners have a right to secure a jury trial on the issue of the automatic stay violation because of the existence of some statutory provision. There simply is no statutory provision which grants such a right under the facts of this case. Moreover, Petitioners have not identified a single statute conferring a right to a jury trial in stay violation cases.

The statute governing jury trials in bankruptcy cases is 28 USC §1411, which provides that:

> (a) Except as provided in subsection (b) of this section, this chapter and Title 11 do not affect any right to trial by

> jury that an individual has under applicable non-bankruptcy law with regard to a personal injury or wrongful death tort claim.

28 USC §1411(a). Subsection (b) then states that the District Court may order the issues arising in connection with an involuntary bankruptcy petition to be tried without a jury. 28 USC §1411(b). While the language of Section 1411 is somewhat ambiguous, it cannot be construed to grant Petitioners a jury trial in an automatic stay violation proceeding. See Granfinanciera, supra, at 40 n.3 (Supreme Court noting that 28 USC §1411 is "notoriously ambiguous.") This action is not a personal injury or a wrongful death tort claim. Therefore, §1411(a) is inapplicable to the instant case. In addition, inasmuch as this

action did not arise in connection with an involuntary bankruptcy petition, §1411(b) is also not applicable. Accord, In re Hallahan, 936 F.2d 1496 (7th Cir. 1991) (court unwilling to enforce the negative implication of §1411(b) that District Courts may not deny jury trials on some issues presented in connection with voluntary petitions). Simply put, Petitioners do not have a statutory right to a jury trial in this action.

The District Court properly remanded the issues of the automatic stay violation to the Bankruptcy Court. The Seventh Amendment does not confer any right to a jury trial in an automatic stay violation proceeding, for such an action has always been deemed equitable rather than legal in nature. There is no statutory provision which allows

Petitioners a right to a jury trial on the issues which the Respondent has ordered be remanded.

CONCLUSION

WHEREFORE, Respondent prays that this Court issue no Writ and the cause relating to the automatic stay violation be remanded as set forth in Respondent's Order.

SUMMERS, COMPTON, WELLS & HAMBURG
Professional Corporation

By: /s/ Ann Sachar
STEVEN M. HAMBURG, #27549
ANN R. SACHAR, #38760
Attorneys for Trustee
8909 Ladue Road
St. Louis, Missouri 63124
(314) 991-4999

CERTIFICATE OF SERVICE

A copy of the above and foregoing mailed this 20th day of, September, 1993, to: David M. Duree, Reinert, Duree & Crane,~PJc.~ 812 North Collins, Laclede's Landing, St. Louis, Missouri--63102-2174.

/s/Initialed AS

G:51024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	
JUST BRAKES CORPORATE SYSTEMS, INC.,	U.S. Bankruptcy Case No. 91-46618-172
Debtor.	
DAVID A. SOSNE, Trustee,	United States Bankruptcy Adversary No. 92-4384
Plaintiff,	
vs.	
REINERT & DUREE, P.C., n/k/a REINERT, DUREE & CRANE, P.C., ET. AL.,	U. S. District Court Cause No. 4:92CV2297SNL
Defendants	

MEMORANDUM AND ORDER

This matter is before the Court on several pending motions regarding this Court's exercise of jurisdiction of this case. Currently pending before the Court are the defendants' motion to withdraw the reference (#5-1), filed November 16, 1992 and motion for summary judgment

(#11-1), filed April 20, 1993; and the plaintiff Trustee's motions to consolidate (#6-1 and #8-1), filed November 16 and December 11, 1992 respectively, and motion to remand (#15), filed April 23, 1993. This memorandum and order will only address the motion to withdraw the reference, the motions to consolidate, and the motion to remand.

On or about September 18, 1992 plaintiff Trustee filed an adversary complaint in the bankruptcy court seeking recovery for violations of the United State Bankruptcy Code, Sections 549 and 550 (preferential transfer of the Debtor's property) and for violations of the automatic stay provisions of Section 362. This complaint shall be referred to as Complaint 1.

On or about October 13, 1992

plaintiff Trustee filed a companion adversary complaint in the bankruptcy court against several of the named defendants in Complaint 1, plus additional named defendants. This complaint also alleged violations of the United States Bankruptcy Code through act(s) of fraudulent conveyance and preferential transfers. This complaint shall be referred to as Complaint 2.

On or about October 22, 1992 the defendants in both complaints filed a jury demand and motions to withdraw the reference. On orabout October 30, 1992 both complaints and their respective motions were transferred to the district court. Complaint 1 and its motions were assigned to the undersigned as Cause No. 92CV2297; Complaint 2 was assigned to Judge Jean C. Hamilton as Cause No.

92CV2298.

On February 5, 1993 Judge Hamilton granted the defendants' motion to withdraw the reference. She determined that the defendants have a right to trial by jury based on the fraudulent conveyance and preferential transfer claims in Complaint 2. Since bankruptcy courts have no statutory authorization to conduct jury trials, the withdrawal of the reference was proper. See, Order of Judge Jean C. Hamilton, filed February 5, 1993, Cause No.4:92CV2298.

Meanwhile, with regard to Complaint 1 in this Court, the defendants' motion to withdraw the reference and the plaintiff Trustee's motions to consolidate were still pending. Plaintiff Trustee then received leave to file an amended adversary complaint (Complaint

1A) deleting all the claims duplicative of Complaint 2. Complaint 1A seeks damages for recovery of violation of the automatic stay only.

The plaintiff Trustee has filed a motion to remand seeking to transfer this action back to the bankruptcy court for disposition. He avers that although actions for violations of the automatic stay are core proceedings, they are not the type of core proceeding which are subject to the Seventh Amendment right to a jury trial. He contends that the instant action does not involve either state created rights nor rights protectable at common law, therefore the defendants are not constitutionally entitled to a jury trial. The defendants, on the other hand, contend that in order for the Trustee to pursue

his claim for violation of the automatic stay, he must first establish that the Debtor had a protected interest in the subject property (trademark) prior to the date the bankruptcy petition was filed (October 15, 1991). They further contend that although the amended adversary complaint eliminates the claim that the January 10, 1991 assignment of the subject trademark by the Debtor was a voidable preference, this issue must first be resolved before the issue of the alleged violation of the automatic stay can be addressed. They argue that they are entitled to have the issue of the voidable preference tried in the district court by a jury.

The amended adversary complaint that presently stands before this Court states only a claim for violation of the

automatic stay. Actions for violations of the automatic stay, while core proceedings, do not entitle the participants to a jury trial. Historically, core proceedings which involve state created rights or rights created by common law have invoked the Seventh Amendment right to trial by jury. Granfinaciera. S.A. v. Nordberg, 492 U.S.33 (1989). However, an action for violation of the automatic stay involves only federal rights created under the bankruptcy code, therefore there is no constitutional entitlement to a jury trial. Budget Service Co. v. Better Homes of Virginia, 804 F.2d. 289, 292(4th Cir. 1986).

As for the defendants' concerns regarding the issue of avoidable preference being tried first in the

district court by ajury, the Court finds no conflict. Presently pending before Judge Hamilton is a similar complaint which presents claims of fraudulent conveyance and preferential transfer. The defendants will get their opportunity to have these claims tried before a jury. Whether these claims will be resolved prior to any hearing on the complaint regarding the alleged violation of the automatic stay is perhaps something to be worked out among the parties, Judge Hamilton and the bankruptcy court.

The plaintiff Trustee has elected to eliminate one of his legal theories for recovery. The defendants have failed to show this Court why he is not entitled to do this. By eliminating one of his claims, the action becomes a summary proceeding which significantly involves

the administration of the Bankruptcy Code; a matter best left to the bankruptcy court to adjudicate.

Accordingly,

IT IS HEREBY ORDERED that the defendants' motion to withdraw the reference (#5-1) be and is DENIED.

IT IS FURTHER ORDERED that the plaintiff Trustee's motions to consolidate (#6-1 and #8-1) be and are DENIED.

IT IS FINALLY ORDERED that the plaintiff Trustee's motion to remand (#15-1) be and is GRANTED. This cause of action, along with any remaining motions, shall be remanded to the United States Bankruptcy Court, Eastern District of Missouri, Eastern Division pursuant to 28 U.S.C. §1452(b).

Dated this 24th day of August, 1993.

/s/ Stephen N. Limbaugh
UNITED STATES DISTRICT JUDGE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-3203EMSL

In Re:	*	
	*	
Reinert & Duree, P.C.;	*	
Gary L. Robbins;	*	Petition for
Robbins & Associates,	*	Writ of
Inc.; Estes & Estes,	*	Mandamus/
Inc., and James Landes,	*	Prohibition
	*	
Petitioners.	*	

JUDGMENT

Petition for writ of mandamus/ prohibition has been considered by the court and is denied. Mandate issued forthwith.

September 27, 1993

Order Entered at the Direction of the Court:

/s/Michael E. Gans
Clerk, U.S. C of Appeals, th Circuit.

Supreme Court, U.S.
FILED
93 1144 FEB 11 1994
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of
The United States

October Term 1993

In Re:	)	
	)	
REINERT & DUREE, P.C.,	)	
GARY ROBBINS,	)	
ROBBINS AND ASSOCIATES,	)	
ESTES & ESTES, INC.,	)	
and JAMES C. LANDES,	)	ON PETITION FOR
	)	WRIT OF MANDAMUS
Petitioners,	)	AND/OR PROHIBITION
	)	
vs.	)	
	)	
THE HONORABLE	)	
STEPHEN N. LIMBAUGH,	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

SUMMERS, COMPTON, WELLS & HAMBURG
Professional Corporation

By: Steven M. Hamburg
STEVEN M. HAMBURG Mo.Bar #27549
Attorney for Respondent
8909 Ladue Road
St. Louis, Missouri 63124
(314)991-4999

No. _____

In The
Supreme Court of
The United States

October Term 1993

In Re:	)	
	)	
REINERT & DUREE, P.C.,	)	
GARY ROBBINS,	)	
ROBBINS AND ASSOCIATES,	)	
ESTES & ESTES, INC.,	)	
and JAMES C. LANDES,	)	**ON PETITION FOR**
	)	**WRIT OF MANDAMUS**
Petitioners,	)	**AND/OR PROHIBITION**
	)	
vs.	)	
	)	
THE HONORABLE	)	
STEPHEN N. LIMBAUGH,	)	
	)	
Respondent.	)	

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

COMES NOW Respondent, the Honorable Stephen N. Limbaugh, by and through his counsel, and for his suggestions in opposition to the Petitioners' Petition for

Writ of Mandamus and/or Prohibition, submits the following memorandum.

QUESTION PRESENTED

Whether there is a right to a jury trial in an action to determine whether a creditor in a bankruptcy proceeding has violated the automatic stay imposed by 11 USC §362.

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In re: Hallahan, 936 F.2d 1496 (7th Cir. 1991) 20

FEDERAL STATUTES AND RULES

11 USC §362(a):

(a) Except as provided in subjection (b) of this section, a petition filed under §301, 302, or 303 of this title, or an application filed under §5(a)(3) of the Securities Investor Protection Act of 1970 (15 USC 78eee(a)(3)), operates as a stay, applicable to all entities of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to

recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

11 USC §1411:

> (a) Except as provided in subsection (b) of this section, this chapter and Title 11 do not affect any right to trial by jury that an individual has under applicable non-bankruptcy law with regard to a personal injury or wrongful death tort claim.
>
> (b) The District Court may order the issues arising [in connection with involuntary bankruptcy petitions] to be tried without a jury.

Rule 38(a) of the Federal Rules of Civil Procedure:

> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES

The Seventh Amendment to the Constitution of the United States:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

STATEMENT OF THE CASE

The underlying lawsuit was originally filed on September 18, 1992 in the United States Bankruptcy Court by David A. Sosne, the duly appointed and acting Chapter 7 Trustee ("Trustee") in the Bankruptcy proceeding of Just Brakes Corporate Systems, Inc. ("Debtor"), being case number, 91-46618-172 (Bkcy. E.D. Mo.). On or about October 22, 1992, Petitioners, the Defendants in the adversary complaint, filed their Jury Demand, Motion to Withdraw Reference to the Bankruptcy Court and Answer. On October 30, 1992, the Honorable James J. Barta, United States Bankruptcy Judge, entered an Order pursuant to Rule 5011 of the Federal Rules of Bankruptcy Procedure, by which all pending matters were transferred to the United States District Court for the Eastern District of Missouri including the Motion for

Withdrawal of Reference and Demand for Jury Trial together with the Trustee's Motion to Consolidate this cause into a companion adversary proceeding now pending before the Honorable Jean C. Hamilton, United States District Judge.[1] Acknowledgment of the transfer was given to the Trustee on or about November 19, 1992 and the underlying case was assigned to the Honorable Stephen N. Limbaugh.

Simultaneously with the filing of the Trustee's Objection and Motion to Remand, the Trustee filed an Amended Adversary Complaint which sought only recovery in the form of damages for alleged willful conduct in violation of the automatic stay. The Amended Complaint alleged that subsequent to the Debtor's filing of a Petition with the Bankruptcy Court, the Petitioners proceeded to continue judicial process

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[1] Case No. 4:92CV2298JCH.

against the Debtor by enforcing against the Debtor and property of the estate a judgment obtained before the commencement of the case; that the Petitioners acted to obtain possession of property of the estate; that the Petitioners acted to enforce their lien against property of the estate and that the Petitioners' actions were to enforce a lien against property of the estate which secured a claim that arose before the commencement of the case. Quite simply, Petitioners improperly continued their execution efforts to recover property of the estate on a claim against the Debtor that arose before the commencement of the bankruptcy case.

On August 2, 1993, the Honorable Stephen N. Limbaugh filed the Memorandum and Order by which the Court, inter alia, granted the Trustee's Motion to Remand after finding there is no entitlement to a

jury trial in an action for violation of the automatic stay imposed by 11 USC §362. See Memorahdum and Order, Appendix A. Thereafter, Petitioners filed a Petition for Writ of Mandamus and/or Prohibition with the United States Court of Appeals for the Eighth Circuit in which they requested that Respondent be compelled to grant Petitioners' request for a jury trial. On September 20, 1993, the Respondent filed his suggestions of Law in Opposition to Petition for Writ of Mandamus and/or Prohibition. On or about September 27, 1993, the United States Court of Appeals for the Eighth Circuit, without opinion, denied the Petitioners' Petition for a Writ of Mandamus and/or Prohibition. On January 13, 1994, the Petitioners filed the instant Petition.[2] In the Petition which

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[2] On December 24, 1993, the Petitioners forwarded to the Clerk of the Court their Petition for Writ of Mandamus and/or

Petitioners have filed with this Court, they have not raised any issues new or different from those which they previously raised in pleadings which they filed with the United States District Court or the United States Court of Appeals for the Eighth Circuit. Insofar as the Respondent correctly determined the issues before him and the Petitioners are not entitled to a jury trial on the question of whether their actions violated the automatic stay, Petitioners' request should be denied.

SUMMARY OF ARGUMENT

The Seventh Amendment does not confer the Petitioners a right to a jury trial in an automatic stay violation proceeding, for such an action has always been deemed equitable rather than legal in nature.

Prohibition. The Petition was returned by the Clerk to Petitioners. The Petitioners resubmitted the Petition to this Court on or about January 13, 1994.

Granfinanciera, S.A. v. Nordbey, 492 U.S. 33 (1989). In addition, there is no statutory provision which allows Petitioners a right to a jury trial in an automatic stay violation proceeding. Because Respondent Limbaugh properly remanded the issues of the automatic stay violation to the Bankruptcy Court, this Court should refuse to issue a Writ and Respondent's Order should be upheld.

ARGUMENT

The sole issue before this Court is whether there exists a right to a jury trial in an action to determine whether a party violated the automatic stay.[3]

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[3] The Petitioners apparently misunderstand Respondent's Memorandum and Order and are confused with respect to the matters raised in the two separate cases which were pending in the District Court. They have misstated the issue to this Court. Although Petitioners assert that the issue before this Court involves the nature of the Debtor's interest in the trademark, in fact the sole issue relates to the right to a jury trial in an automatic stay violation

Petitioners allege that they are entitled to a jury trial pursuant to the Seventh Amendment, Rule 38 of the Federal Rules of Civil Procedure and under Granfinanciera, S.A. v. Nordbey, 492 U.S. 33 (1989). Insofar as neither the Seventh Amendment, Rule 38, nor Granfinanciera entitle Petitioners to a jury trial in an automatic stay violation proceeding, the Court has no basis to issue a Writ and Respondent's Memorandum should be upheld.[4]

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proceeding. Respondent Limbaugh's Memorandum states that the issue relating to Debtor's interest remains pending before Judge Hamilton in the related proceeding in which Petitioners may have an opportunity to have the claims with respect to the fraudulent conveyance and preferential transfer tried to a jury. See Appendix A attached hereto. The action pending before Judge Hamilton has been set for a jury trial on October 3, 1994. As Respondent Limbaugh's Memorandum notes, the Amended Adversary Complaint before the Court stated only a claim for violation of the automatic stay. Id.

[4] Rule 38(a) of the Federal Rules of Civil Procedure states that the right to a jury trial as declared by the Seventh

A. PETITIONERS DO NOT HAVE A SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

In Granfinanciera, S.A. v. Nordbey, 492 U.S. 33 (1989), the Supreme Court set forth the analysis to employ in determining when the Seventh Amendment right to a jury trial attaches in a bankruptcy case.[5] A proper determination of whether the Seventh Amendment confers a right to a jury trial in an action heard in Bankruptcy Court entails a two-part inquiry:

> First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and

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Amendment or as granted by a federal statutory provision shall be preserved. For the reasons set forth below in parts A and B, respectively, Petitioners are not entitled to a jury trial pursuant to Rule 38.

[5] At issue in Granfinanciera was whether a party who had not filed a claim against the bankruptcy estate had a right to a jury trial in an action by the Trustee to recover an allegedly fraudulent transfer of money.

> determine whether it is legal or equitable in nature.[6]

492 U.S. at 42 (citing Tull v. United States, 481 U.S. 412, 417-18 (1987)). In order for the Court to determine Petitioners' right to a jury trial under the Seventh Amendment, the nature of the claim and the relief requested must be examined. In re Hooper, 112 B.R. 1009, 1011-12 (9th Cir. BAP 1990). Applying this Court's holding in Granfinanciera to the instant case, Petitioners have no Seventh Amendment right to a jury trial on the

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[6] This Court added that "if these two factors indicate that a party is entitled to a jury trial under the Seventh Amendment, we must decide whether Congress may assign and has assigned resolution of the relevant claim to a non-Article III adjudicative body that does not use the jury as a fact finder." Id. Because Petitioners are not entitled to a jury trial under the first two components of the Granfinanciera test, this Court need not make a determination under this third component of the test.

issue of the violation of the automatic stay.

First, an action for violation of the automatic stay is a type of equitable claim for which a party cannot obtain a jury trial. Automatic stay proceedings, like actions to recover preferences and fraudulent conveyances, are core proceedings. See 28 USC §157(b) (1988); see also Budget Service Co. v. Better Homes of Virginia, 804 F.2d 289, 292 (4th Cir. 1986). Unlike actions to recover preferential transfers, however, automatic stay proceedings historically have been equitable actions tried without juries and "the violation . . . charged is an integral part of the federal rights created under the Bankruptcy Code." Budget, supra, at 292. Indeed, Petitioners cite no authority indicating that the issue of an automatic

stay violation would have been determined by a jury trial.

Moreover, the genesis of bankruptcy relief is founded in proceedings brought in English courts of equity. Hooper, supra, at 1012 (citing 1 Norton Bankruptcy Law and Practice, §16.02 (1981)). The automatic stay, and issues surrounding its violation, modification and annulment, are "inextricably bound to and arise only in connection with bankruptcy relief because such issues concern whether the debtor will be granted the protection and benefits of bankruptcy." Id. The importance of the automatic stay is echoed in the legislative history of 11 USC §362 which provides, in part:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor

> to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. No. 95-595, 95th Cong., 1 Sess. 340-42 (1977); S.R.No. 95-989, 95th Cong., 2nd Sess. 54-55 (1978); reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5840, 6296-97. The close tie of the protection and benefits afforded a debtor in bankruptcy to the historically equitable bankruptcy process provides further indication of the equitable roots of automatic stay issues.

An examination of the remedies sought also indicates that the automatic stay violation issue is equitable in nature. The ultimate relief sought by the Trustee is a determination that, as to particular collection efforts, the Petitioners violated the automatic stay when they recovered over $100,000.00 which was received after the post-bankruptcy filing

execution sale. Because of the equitable nature of the remedy sought and the historical equitable roots of automatic stay violation issues, under this Court's test announced in Granfinanciera, the Seventh Amendment does not entitle Petitioners to a jury trial on the issue of whether they violated the automatic stay. Therefore, to the extent Petitioners demand a jury trial pursuant to the Seventh Amendment, their demand finds no support in the law and the matter should be remanded to the Bankruptcy Court for a non-jury trial. Accord Budget, supra, at 292.

B. PETITIONERS DO NOT HAVE A STATUTORY RIGHT TO A JURY TRIAL.

Neither do the Petitioners have a right to secure a jury trial on the issue of the automatic stay violation because of the existence of some statutory provision. There simply is no statutory provision which grants such a right under the facts

of this case. Moreover, Petitioners have not identified a single statute conferring a right to a jury trial in stay violation cases.

The statute governing jury trials in bankruptcy cases is 28 USC §1411, which provides that:

> (a) Except as provided in subsection (b) of this section, this chapter and Title 11 do not affect any right to trial by jury that an individual has under applicable non-bankruptcy law with regard to a personal injury or wrongful death tort claim.

28 USC §1411(a). Subsection (b) then states that the District Court may order the issues arising in connection with an involuntary bankruptcy petition to be tried without a jury. 28 USC §1411(b). While the language of Section 1411 is somewhat ambiguous, it cannot be construed to grant Petitioners a jury trial in an automatic stay violation proceeding. See Granfinanciera, supra, at 40 n.3 (This

Court noting that 28 USC §1411 is "notoriously ambiguous.") This action is not a personal injury or a wrongful death tort claim. Therefore, Section 1411(a) is inapplicable to the instant case. In addition, inasmuch as this action did not arise in connection with an involuntary bankruptcy petition, Section 1411(b) is also not applicable. Accord, In re Hallahan, 936 F.2d 1496 (7th Cir. 1991) (court unwilling to enforce the negative implication of Section 1411(b) that District Courts may not deny jury trials on some issues presented in connection with voluntary petitions). Simply put, Petitioners do not have a statutory right to a jury trial in this action.

The District Court properly remanded the issues of the automatic stay violation to the Bankruptcy Court. The Seventh Amendment does not confer any right to a

jury trial in an automatic stay violation proceeding, for such an action has always been deemed equitable rather than legal in nature. There is no statutory provision which allows Petitioners a right to a jury trial on the issues which the Respondent has ordered be remanded.

CONCLUSION

WHEREFORE, Respondent prays that this Court issue no Writ and the cause relating to the automatic stay violation be remanded as set forth in Respondent's Order.

SUMMERS, COMPTON, WELLS & HAMBURG
Professional Corporation

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE:	)	
	)	
JUST BRAKES CORPORATE SYSTEMS, INC.,	)	U.S. Bankruptcy Case No. 91-46618-172
Debtor.	)	
	)	
DAVID A. SOSNE, Trustee,	)	United States Bankruptcy Adversary No. 92-4384
Plaintiff,	)	
vs.	)	
	)	U. S. District Court Cause No. 4:92CV2297SNL
REINERT & DUREE, P.C., n/k/a REINERT, DUREE & CRANE, P.C., ET. AL.,	)	
Defendants	)	

MEMORANDUM AND ORDER

This matter is before the Court on several pending motions regarding this Court's exercise of jurisdiction of this case. Currently pending before the Court are the defendants' motion to withdraw the reference (#5-1), filed November 16, 1992 and motion for summary judgment

(#11-1), filed April 20, 1993; and the plaintiff Trustee's motions to consolidate (#6-1 and #8-1), filed November 16 and December 11, 1992 respectively, and motion to remand (#15), filed April 23, 1993. This memorandum and order will only address the motion to withdraw the reference, the motions to consolidate, and the motion to remand.

On or about September 18, 1992 plaintiff Trustee filed an adversary complaint in the bankruptcy court seeking recovery for violations of the United State Bankruptcy Code, Sections 549 and 550 (preferential transfer of the Debtor's property) and for violations of the automatic stay provisions of Section 362. This complaint shall be referred to as Complaint 1.

On or about October 13, 1992

plaintiff Trustee filed a companion adversary complaint in the bankruptcy court against several of the named defendants in Complaint 1, plus additional named defendants. This complaint also alleged violations of the United States Bankruptcy Code through act(s) of fraudulent conveyance and preferential transfers. This complaint shall be referred to as Complaint 2.

On or about October 22, 1992 the defendants in both complaints filed a jury demand and motions to withdraw the reference. On orabout October 30, 1992 both complaints and their respective motions were transferred to the district court. Complaint 1 and its motions were assigned to the undersigned as Cause No. 92CV2297; Complaint 2 was assigned to Judge Jean C. Hamilton as Cause No.

92CV2298.

On February 5, 1993 Judge Hamilton granted the defendants' motion to withdraw the reference. She determined that the defendants have a right to trial by jury based on the fraudulent conveyance and preferential transfer claims in Complaint 2. Since bankruptcy courts have no statutory authorization to conduct jury trials, the withdrawal of the reference was proper. See, Order of Judge Jean C. Hamilton, filed February 5, 1993, Cause No.4:92CV2298.

Meanwhile, with regard to Complaint 1 in this Court, the defendants' motion to withdraw the reference and the plaintiff Trustee's motions to consolidate were still pending. Plaintiff Trustee then received leave to file an amended adversary complaint (Complaint

1A) deleting all the claims duplicative of Complaint 2. Complaint 1A seeks damages for recovery of violation of the automatic stay only.

The plaintiff Trustee has filed a motion to remand seeking to transfer this action back to the bankruptcy court for disposition. He avers that although actions for violations of the automatic stay are core proceedings, they are not the type of core proceeding which are subject to the Seventh Amendment right to a jury trial. He contends that the instant action does not involve either state created rights nor rights protectable at common law, therefore the defendants are not constitutionally entitled to a jury trial. The defendants, on the other hand, contend that in order for the Trustee to pursue

his claim for violation of the automatic stay, he must first establish that the Debtor had a protected interest in the subject property (trademark) prior to the date the bankruptcy petition was filed (October 15, 1991). They further contend that although the amended adversary complaint eliminates the claim that the January 10, 1991 assignment of the subject trademark by the Debtor was a voidable preference, this issue must first be resolved before the issue of the alleged violation of the automatic stay can be addressed. They argue that they are entitled to have the issue of the voidable preference tried in the district court by a jury.

The amended adversary complaint that presently stands before this Court states only a claim for violation of the

automatic stay. Actions for violations of the automatic stay, while core proceedings, do not entitle the participants to a jury trial. Historically, core proceedings which involve state created rights or rights created by common law have invoked the Seventh Amendment right to trial by jury. Granfinaciera. S.A. v. Nordberg, 492 U.S.33 (1989). However, an action for violation of the automatic stay involves only federal rights created under the bankruptcy code, therefore there is no constitutional entitlement to a jury trial. Budget Service Co. v. Better Homes of Virginia, 804 F.2d. 289, 292(4th Cir. 1986).

As for the defendants' concerns regarding the issue of avoidable preference being tried first in the

district court by ajury, the Court finds no conflict. Presently pending before Judge Hamilton is a similar complaint which presents claims of fraudulent conveyance and preferential transfer. The defendants will get their opportunity to have these claims tried before a jury. Whether these claims will be resolved prior to any hearing on the complaint regarding the alleged violation of the automatic stay is perhaps something to be worked out among the parties, Judge Hamilton and the bankruptcy court.

The plaintiff Trustee has elected to eliminate one of his legal theories for recovery. The defendants have failed to show this Court why he is not entitled to do this. By eliminating one of his claims, the action becomes a summary proceeding which significantly involves

the administration of the Bankruptcy Code; a matter best left to the bankruptcy court to adjudicate.

Accordingly,

IT IS HEREBY ORDERED that the defendants' motion to withdraw the reference (#5-1) be and is DENIED.

IT IS FURTHER ORDERED that the plaintiff Trustee's motions to consolidate (#6-1 and #8-1) be and are DENIED.

IT IS FINALLY ORDERED that the plaintiff Trustee's motion to remand (#15-1) be and is GRANTED. This cause of action, along with any remaining motions, shall be remanded to the United States Bankruptcy Court, Eastern District of Missouri, Eastern Division pursuant to 28 U.S.C. §1452(b).

Dated this 24th day of August, 1993.

/s/ Stephen N. Limbaugh
UNITED STATES DISTRICT JUDGE